REPORTS

OF

CASES

ADJUDGED IN THE

Court of King's Bench:

WITH SOME

SPECIAL CASES

IN THE

Courts of Chancery, Common Pleas, and Exchequer,

ALPHABETICALLY DIGESTED UNDER PROPER HEADS;

FROM THE FIRST YEAR OF KING WILLIAM AND QUEEN MARY, TO THE TENTH YEAR OF QUEEN ANNE.

BY WILLIAM SALKELD,

LATE SERJEANT AT LAW.

FROM THE SIXTH LONDON EDITION:

INCLUDING THE NOTES AND REFERENCES

OF

KNIGHTLEY D'ANVERS, Esq. and Mr. Serjeant WILSON;

AND LARGE ADDITIONS OF NOTES AND REFERENCES TO MODERN AUTHORITIES AND DETERMINATIONS,

BY WILLIAM DAVID EVANS, Esq.

BARRISTER AT LAW.

IN THREE VOLUMES.

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A

TABLE

OF THE

NAMES OF THE CASES

IN THE

SECOND VOLUME.

A.

B.

S.

S.

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TABLE

OF THE

GENERAL TITLES

IN THE

SECOND VOLUME.



LAW COMMON, CANON, CIVIL, &c.

1. BLANKARD v. GALDY.

[Trin. 5 W. & M. B. R. Intr. Pas. 3. W. & M. Rot. 35.]

S. C. 4 Mod. 215, 222, 223, &c. See the Pleadings. ibid. Comb. 228. Holt 341.

Where an uninhabited country is found out and planted by English subjects, all laws in force here are immediately in force there; but in the case of an inhabited country conquered, not till declared so by the conqueror. Vide 3 Keb. 401, &c. 2 And. 116. 4 Leon. 63. 7 Co. Calvin 23. Vaugh. 279, &c. 2 Vent. 4. Post. 666. Comber. 228, 229. 2 Mod. 45. 2 Wms. 75. Sho. Parl. Ca. 31. 1 Bl. Com. 106.

IN *debt* on a bond, the defendant prayed *oyer* of the condition, and pleaded the statute *E.* 6. against buying offices concerning the administration of justice; and averred, That this bond was given for the purchase of the office of provost-marshal in *Jamaica*, and that it concerned the administration of justice, and that *Jamaica* is part of the revenue and possessions of the Crown of *England:* The plaintiff replied, that *Jamaica* is an island beyond the seas, which was conquered from the *Indians* and *Spaniards* in Q. *Elizabeth's* time, and the inhabitants are governed by their own laws, and not by the laws of *England:* The defendant rejoined, That before such conquest they were governed by their own laws; but since that, by the laws of *England: Shower* argued for the plaintiff, that, on a judgment in *Jamaica*, no writ of error lies here, but only an appeal to the Council; and as they are not represented in our parliament, so they are not bound by our statutes, unless specially named. *Vide And.* 115. *Pemberton contra* argued, that by the conquest of a nation, its liberties, rights, and properties are quite lost; that by consequence their laws are lost too, for the law is but the rule and guard of the other; those that conquer, cannot by their victory lose their laws, and become subject to others. *Vide Vaugh.* 405. That error lies here upon a judgment in *Jamaica*, which could not be if they were not under the same law. *Et per Holt*, C. J. & *Cur.*,

Vide Cowp. 208 4 Bur. 2500. Doug. 38.

1st, In case of an uninhabited country newly found out by *English* subjects, all laws in force in *England* are in force there; so it seemed to be agreed.

2dly, *Jamaica* being conquered, and not pleaded to be parcel of the kingdom of *England*, but part of the pos-

sessions and revenue of the Crown of *England*, the laws of *England* did not take place there, until declared so by the conqueror or his successors. The *Isle of Man* and *Ireland* are part of the possessions of the Crown of *England;* yet retain their ancient laws: * That in *Davis* 36. it is not pretended, that the custom of *tanistry* was determined by the conquest of *Ireland*, but by the new settlement made there after the conquest: That it was impossible the laws of this nation, by mere conquest, without more, should take place in a conquered country; because, for a time, there must want officers, without which our laws can have no force:

Post. 510. 5 Mod 187

That if our law did take place, yet they in *Jamaica* having power to make new laws, our general laws may be altered by theirs in particulars; also they held, that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity. Judgment *pro quer'*.

Vide Post. 672.

2. MATTHEW *v.* BURDETT.

[Hil. 1 Ann. B. R.]

2 Stran. 1057. Canons oblige not the laity without the consent of the civil legislative power. Vide Hale's Hist. of the Law, pag. 28 to 33. 12 Co. 72. 2 Inst. 57. 647, 653, 657. 2 Rol. Abr. 226, 454. Mo. 782. Br. Ordinary 1. 2 Cro. 670. 2 Brownl. 38. Cro. Car. 588. Palm. 379 3 Salk. 318. S. C. 2 Vent. 44. 2 Lev. 222. 2 Inst. 97. Cases in B. R. Tempore Lord Hardwicke 57, 326, 335. 1 Bl. Com. 82.

IN the primitive church, the laity were present at all synods: When the empire became Christian, no canon was made without the emperor's consent: The emperor's consent included that of the people, he having in himself the whole legislative power, which our kings have not: Therefore, if the king and clergy make a canon, it binds the clergy *in re ecclesiastica*, but it does not bind laymen; they are not represented in convocation; their consent is neither asked nor given.

LEASES.

2 Show. 31.

1. HATHS *v.* ASH.

[Trin. 8 W. 3. C. B.]

A LEASE to commence *a datu*, includes the day of the date. Adjudged by three judges against *Treby*, C. J. But note, *a die datus* excludes the day (*a*). *Vide* 5 *Co.* 1. 94 *B.* 2 *Co.* 55. 2 *Bulst.* 83, 305. 3 *Bulst.* 203. *Aleyn* 77. *Ray.* 84.

Commencement a datu. Vide post. 625, 627. 1 Salk. 44. 2 Mod. 215. 6 Mod. 260. 3 Lev. 438. 5 Co. 21, 100. Cro. Jac. 258, 18, called Hatter v. Ashe. Al. 77. 1 Rol. R. 8, 3. 1 Wilson 176. 2 Ib. 165. 2 Ld. Ray. 1242.

(*a*) *R.* in the case of *Pugh* and the Duke of *Leeds*, *Cowp.* 714, that a lease to commence from the day of the date is good, under a power to grant leases in possession only, and not in reversion. The case has been since adopted as a ruling decision, that *from any time* is to be construed exclusively or inclusively, as may best effectuate the act intended to be done by the parties. *Vide* 5 *T. R.* 286.

2. STOMFIL *v.* HICKS.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 280. S. C.]

1. *LEASES* to *B.* for a year, and from year to year as long as it shall please both parties. Adjudged that this is a lease for two years, and afterwards at will; and so it was ruled *inter Bellasis* and *Burbrich. Hill.* 8 *W.* 3. *C. B. Vide infra*, *pl.* 4. *contra*, and *pl.* 6 (*a*).

Lease for a year, and so from year to year, quamdiu, &c. Vide post. pl. 6. Holt 414. S. C. 1 Wils. 262.

2. *A.* possessed of a term for 100 years, grants the land, *habendum* for forty years, to commence after his death. This is a good new lease; and if *H.* possessed of a term for 20 years, grants the tenements for nineteen years, to commence after his death, this will be good for so much of the twenty years as shall be unexpired at the time of his death. Ruled by *Holt*, C. J. at Lent assizes at *Dorchester*, 10 *W.* 3. *Gree* versus *Studley*.

Termor for years grants for a less term, to commence after his death, good. 1 Sid. 359. 1 Mod. 4. 1 Lutw. 213, 214. Alleyn 4. Cro. El. 775. Cro. Jac. 71. 6 Co. 36. 1 Lev. 35.

3. If *A.* demise lands to *B.* for a year, and so from year to year, this is not a lease for two years, and afterwards

Lease for a year and so from year to year, quam-

(*a*) *S. C. Lut.* 313. *quod vide: Vide* also some observations on the point as here stated. 1 *T. R.* 380.

diu, &c. what it is, and when it may be determined. Vide prox. p. When lessor or lessee at will may determine his will. Vide infra.

at will; but it is a lease for every particular year, and after the year is begun, the defendant cannot determine the lease before the year is ended. But in a lease at will, the defendant may determine his will after payment of his rent, at the end of a quarter, but not the beginning, lest the lessor should lose his rent (*a*). The lessor cannot determine his will in the middle of a quarter, without permitting the tenant to have the emblements. Ruled by *Holt*, C. J. at Summer assizes at *Lincoln*, 1699 (*b*).

(*a*) Cited 4 *T. R.* 680.

(*b*) Courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year, so long as both parties please, especially where an annual rent is reserved. 2 *Bl. Com.* 147. In *Timmins* v. *Rowlinson*, 3 *Bur.* 1601, 1609., it is said, *per Curiam*, that leases at will, in the strict legal notion of a lease at will, exist now only notionally: upon which Mr. *Hargrave* remarks, that he presumes the observation means not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by express words, and that judges incline strongly against implying them. Note 3 to *Co. Lit.* 55. *a.*, *Roe ex dem. Bree* v. *Lees*, 2 *Bl. Rep.* 1171. Where lands, the greatest part whereof were enclosed, but some were in an open common field, were taken generally by parol at an annual rent, and a custom was proved in the parish, that when any tenant took a farm, in which there was any open field land, more or less, for an uncertain term, it was considered as a holding from three years to three years. This was ruled to be a tenancy from year to year, and the custom was deemed invalid. Lord Ch. J. *De Grey* said, All leases for an uncertain term are, *prima facie*, leases at will; it is the reservation of an annual rent that turns them into leases from year to year: it is possible that custom may make them leases for a longer term, as where the crop (as of liquorice or madder) does not come to perfection in less than two years; and I will not say that the nature of the ground, or the course of husbandry, may not deserve to be considered when such a case comes nakedly before the Court. The interest of tenant from year to year devolves upon his executors or administrators. *Doe ex dem. Shore* v. *Potter*, 3 *T. R.* 15. The tenancy can only be determined at the end of a year, and upon giving a full half-year's notice. *Right ex dem. Flower* v. *Darby*, 1 *T. R.* 159. vide *Parker ex dem. Walker* v. *Constable*, 3 *Wils.* 25. When any such tenancy has commenced, it continues against any person to whom the lessor may afterwards grant the reversion, *Birch* v. *Wright*, 1 *T. R.* 378.; or any person to whom it may come, though an infant. *Maddon ex dem. Baker* and others v. *White*, 2 *T. R.* 159. If tenant for life demise for years and die, and the reversioner permit the under-tenant to continne in possession, and receive the rent from him according to the terms of the lease, it is evidence of an agreement that the tenant shall continue to hold from year to year, from the day, and according to the terms of the original demise. *Roe* v. *Ward*, 1 *Hen. Bl.* 97. On an agreement to let a farm, to hold part from the 13th February, another part from the 5th April, and the remainder from the 12th May, and to pay rent at Old Lady-day, (5th April,) and old Michaelmas, the tenancy of the whole is substantially from Old Lady-day; and notice six months before that day to quit on the days of entry is sufficient. *Doe ex dem. Daggett* v *Snowden*, 2 *Bl.* 1224. Where an agreement for a longer term than three years is made by parol, which is void as to the duration of the term, there is a tenancy from year to year regulated

in every other respect by the agreement. *Doe ex dem. Rigge* v. *Bell*, 5 *T. R.* 471. The time for giving notice may be different from half a year, by agreement, or the custom of particular places, *semble, Timmins* v. *Rowlinson, Doe* v. *Snowden, ubi sup. Butl. no.* to *Co. Litt.* 270. *b. Vide Oakapple* v. *Capous*, 4 *T. R.* 361. 5 *T. Rep. Per Buller*, J. *Lanc.* Lent assizes 1790. on notices to quit, if no time of entry appear, the custom of the country shall be, *prima facie*, evidence; if there is no such custom, the rent-day shall be deemed the day of entry; if there are two rent-days, the plaintiff's notice shall be presumed right, until the defendant prove it to be wrong; and if the tenant enters about the usual day, the entry shall relate to such day. *Vide Espin. N. P.* 461. *b.*

3. LEIGHTON *v.* THEED.

[Hill. 13 W. 3. B. R. 1 L. Raym. 707. S. C.]

IF *H.* holds lands at will, rendering rent quarterly, the lessor may determine his will when he pleases; but if he determines it within a quarter, he shall lose the rent which should * have been paid for that quarter in which he determines it. So the lessee may determine it when he pleases, but then he must pay the quarter's rent. *Per Holt*, C. J. (*a*). When lessor or lessee at will may determine his will. Vide supra & prox. p. Vide Co. Lit. 55. b. [* 414]

(*a*) *Vide Butl. Co. Lit.* 270. *b. n.* 1.

4. LEGG *v.* STRUDWICK.

[Hill. 7 Ann. B. R.]

IN *replevin* the defendant avowed, for that he being seised in fee of the *locus in quo*, demised the same to *A.*, *habendum de anno in annum & sic ultra quamdiu ambabus partibus placeret* to commence from *Lady-day* 1703, rendering an annual rent, payable quarterly. The lessee entered, and died the 17th of *December* 1706. And the rent for a year and a half ending at *Christmas* before was arrear, for which the lessor entered and distrained. To this the plaintiff demurred. *Et per Curiam* it was held, first, That after the two years, the lessor or lessee might determine; but if the lessee held on, he was not then tenant at will, but for a year certain: for his holding on must be taken to be an agreement to the original contract (*a*), and in execution of it; and the first contract was from year to year. 2dly, The third year is not in the nature of a distinct interest, because it arises from the same executory contract, and therefore the lessor may distrain the third year for the rent

Parol demise to hold from year to year, & sic ultra quamdiu, &c., is a lease for two years, and after every subsequent year begun, not determinable till that be ended. See p. 413. 1 Mod. 4. 1 Lutw. 213, 214. Rep. A. Q. 203. S. C. Holt 417. And not void by the statute of frauds.

(*a*) *R. acc.* 1 *T. R.* 378. *Vide* 305. 1 *Wils.* 262. 3 *T. R.* 16. *Rep. B. R. Temp. Hard.*

of the second; and such an executory contract as this is not void by the statute of frauds, though it be for more than three years, because there is hereby no term for above two years ever subsisting at the same time; and there can be no fraud to a purchaser, for the utmost interest that can be to bind him, can be only one year. And *Holt*, C. J. cited this case *coram Hale*, C. J. A composition was agreed upon between the parson and his parishioners for tithes *quamdiu ambabus partibus placuerit.* If the parishioner ploughs and sows, the parson shall not that year recede, and demand tithe in kind, but must make his election at the beginning of the next year; for the parishioner would not perhaps have sowed his land, but that he relied upon his contract. *Cro. El.* 775. *Keilw.* 75. *Alleyn* 4. 2 *Jon.* 5. 1 *Sid.* 359. 14 *H.* 8. 10.

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[415] Vide Post 464, 508, 547.

LEGACY.

1. EWER *v.* JONES.

[Mich. 2 Ann. B. R.]

Action lies for a legacy devised out of land. See 2 Show. 36, 37. 1 Chan. Cases 57, 257, 258. 1 Ch. Rep. 134, 218, & prox. pag.

IT was held by *Holt*, C. J. clearly, that a devisee may maintain an action at common law against a tertenant for a legacy devised out of land; for where a statute, as the statute of wills, give a right, the party by consequence shall have an action at law to recover it (*a*).

Mod. Cases 26. 6 Mod. 26. Holt 419. S. C. 2 Ld. Raym. 937. S. P. 3 Salk. 227. S. C. not S. P.

(*a*) The question in this case related to a very different subject (the pleading the statute of limitations to a suit in the admiralty for wages). The point here stated is mentioned in the reports of the case, 6 *Mod.* 26, and 2 Ld. *Raym.* 937., but in both those books it is tacked at the end of the case, without shewing how the Ch. Justice connected it with his argument. In *Holt* 419. it is mentioned (as here) without any reference to the principal case. In *Com.* 137., and 3 *Salk.* 227. it is wholly unnoticed.

2. SMELL *contra* DEE.

[Mich. 6 Ann. In Canc.]

H. Bequeathed by his will in these words, *viz. I give 100l. a-piece to the two children of* J. S. *at the end of ten years after my decease:* The children died within the ten years. *Et per Cowper*, Lord Chancellor, This is a lapsed legacy, and shall not go to the executors of the children; for the diversity is where the bequest is to take effect at a future time, and where the payment is to be made at a future time. And though it was objected by Sir *Thomas Powys*, that this differed from the case where a man devised 100*l.* to *J. S.* at his age of twenty-one, because it is a contingency whether he attain to that age: but the expiration of the ten years is inevitable; yet the Lord Chancellor answered, that wherever the time is annexed to the legacy itself, and not to the payment of it, if the legatee dies before the time of payment, it is a lapsed legacy in that case. *Vide Dy.* 59. *b.* 2 *Vent.* 342. *Off. Ex.* 347. *Swinb.* 311, 313. (*a*)

Where a time is annexed to the legacy, and not to the payment, and legatee dies before that time, it is lapsed. Hugh's Abr. 1 pt. 664. c. 14.

2 Vent. 346, 366. 2 Chan. Cases 155. Skin. 148. See 1 Chan. Cases 60. 196. 1 Chan. Rep. 183, 188. 2 Chan. Rep. 98. 2 Vern. 508, 673.

If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death; but it seems a year shall be allowed, for so long the statute of distribution allows before the distribution be compellable, and so long the executor shall have, that it may appear whether there be any debts; but if the legatee be of full age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable, but upon demand, and he shall

(*a*) *Vide* 1 *Br. Ch.* 119., and notes in 2d ed. thereof 191, 298. *Forrester* 117. 2 *Atk.* 185. 1 *Vez.* 44, 208. 1 *Wms.* 566. 3 *Bro. P. C.* 337. 2 *Bro. Ch.* 75. 3 *Bro. Ch.* 298, 473. *Butl.* note to *Co. Lit.* 237. 2 *Ch. Ca.* 155. 1 *Eq. Ca. Ab.* 295. 1 *Vern.* 225. 3 *Atk.* 427. 2 *Wms.* 612.

In 1 *Brown.* 298., 3 *Brown.* 473., this subject is very fully investigated, and the several cases relative to it are considered. The result as to personal legacies is as stated in the authority last mentioned. That when the time is mentioned as referring to the legacy itself, unless it appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely postponed, not being annexed to the substance of the gift; but if the testator intended it as a condition precedent upon which the legacy must take place, then, if such condition or contingency does not happen, the gift never arrives. The word *if* is always considered as conditional; *at* such a time, is also held to be attached to the substance of the legacy; *when* is merely to denote the time of payment; giving interest in the mean time also shews the legacy to be immediately vested.

not have interest but from the time of his demand; otherwise it is in case of an infant, because no laches is imputed to him. But where a certain legacy is left payable at
[416] a day certain, it must be paid with interest from that day (*a*). *Et nota;* The interest allowed is 5*l.* *per cent.* (*b*), *per Cowper*, Lord Chancellor.

(*a*) Legacies chargeable upon land yielding present profit, (or rents charge, *Stonehouse* v. *Evelyn*, 3 *Wms.* 252.), mortgages carrying interest, or stocks yielding profits half-yearly, carry interest from the testator's death. Those given out of the personal estate, or charged on a dry reversion, from the end of a year afterwards, *Maxwell* v. *Wettenhall*, 2 *P. Wms.* 25. In *Knapp* v. *Powell*, *Prec. ch.* 11. 2 *Eq. Ca. b.* 564., a legatee who had no notice of his legacy or the testator's death, till the executor published it in the Gazette, and then demanded it, was not allowed any interest.

In *Joliff* v. *Crow*, *Prec. Ch.* 161. 1 *Eq. Ab.* 286. 2 *Eq Ab.* 565., it was ruled that a legacy payable on a certain day, should only carry interest from the time of its being demanded. But in *East* v. *Thornbury*, 3 *Wms.* 125., where a legacy was given to *A.* payable at the end of a year from the testator's death, and *A.* after that period intermarried with *B.*, who received interest from the marriage for some years, and then received the legacy and gave a receipt; *A.* and *B.* were allowed to recover the interest which had accrued from the end of the year until the intermarriage. Where a legacy was to be paid within five years, interest was decreed from the end of the five years, *Lloyd* v. *Williams*, 2 *Atk.* 110. *Vide Bilson* v. *Saunders*, *Bunb.* 240. See *Ca. Ch.* 72.

If a parent gives legacies to his children, payable at twenty-one, or any other given period, without making an express provision for their maintenance, they are entitled to interest in the mean time; but it is otherwise with respect to legacies by strangers. *Attorney-General* v. *Thompson*, *Prec. Ch.* 3§7. 1 *Eq. Ab.* 801. *Harvey* v. *Harvey*, 2 *P. Wms.* 21. *Green* v. *Belcher*, 1 *Atk.* 505. *Incledon* v. *Northcote*, 3 *Atk.* 430, 438. *Heath* v. *Perry*, 3 *Atk.* 102. Such a legacy by a grandfather does not carry interest, *Palmer* v. *Mason*, 1 *Atk.* 505. *Butler* v. *Freeman*, 3 *Atk.* 58.; nor does a legacy from a father, if other maintenance is expressly provided, *Hearle* v. *Greenbank*, 1 *Vez.* 299, §07.

If certain property in the funds is specially bequeathed, the legatee is entitled to the produce from the testator's death; but it is otherwise if a quantity of stock is given generally, *Sleech* v. *Thorington*, 2 *Vez.* 560.

With respect to interest, when a legacy is given *in præsenti* to an infant, and limited over upon his dying under age, *vide Lillcott* v. *Compton*, 2 *Vern.* 638. *Tisson* v. *Tisson*, 1 *Wms.* 500. *Green* v. *Eakins*, 2. *Atk.* 473. *Chaworth* v. *Hooper*, 1 *Bro. Ch.* 82. *Hawkins* v. *Coombe*, 1 *Bro. Ch.* 335. *Shephard* v. *Ingrain*, *Ambler* 448. *Taylor* v. *Johnson*, 2 *Wms.* 504.

With respect to points on the construction of wills relative to this subject, *vide Acherly* v. *Wheeler*, 1 *Wms.* 783. *Heath* v. *Perry*, 3 *Atk.* 101. *Beckford* v. *Tobin*, 1 *Vez.* 308.

(*b*) *Bryant* v. *Speke*, 1 *Vez.* 171., *Per* Ld. Chancellor, The general rate is, that legacies out of real estate carry one *per cent.* lower than the legal interest; but if out of personal estate, because of the higher interest of money than land, it shall carry the legal interest, unless particular circumstances induce the Court to vary therefrom; but for that a special case must be made. *Vide Beckford* v. *Tobin*, 1 *Vez.* 308. *Moore* v. *Moore*, 3 *Atk.* 402. Ld. *Trimlestown* v. *Colt*, 1 *Vez.* 277.

3. HERN *contra* MERICK.

[*Coram* Harcourt, Lord Chancellor. In Canc. S. C. 1 P. Wms. 201. Gilb. Chan. 307. 1 Eq. Ca. Ab. 143. pl. 11.]

H. SEISED in fee, and indebted by bonds, by will gives legacies to children, (whom he had otherwise provided for before,) and devises his land to his eldest son in tail. The eldest son, being also executor, pays the bonds with the personal estate; and now the legatees brought a bill to come against the real estate in the place of the bond creditors, and be paid out of the land. The Court seemed to admit, that if the lands had descended, the legatees might have been relieved in this manner; but since the testator had devised them, it was resolved, that they ought to be exempted; for it was as much the testator's intention that the devisee should have this land as the other should have the legacies, and a specific legacy is never broke into, in order to make good a pecuniary one. Also this case is [illegible]t of the statute against fraudulent devises, because the debts are paid, and the children being otherwise provided for, are not in the nature of creditors. *Nota;* This case was upon an appeal from the decree of the Master of the Rolls, who held, that the real and personal estate should be so charged, that both the debts and legacies should be paid (*a*).

Where real estate shall be charged with legacies in equity. Vide ante 415. 1 Chan. Rep. 134, 288. 2 Chan. Rep. 200. 1 Chan. Cases 57. 257, 258. 1 Wilson 24. 2 Atk. 624. 1 Vent. 31. 2 Vern. 727.

Skin. 138.

(*a*) In *Clifton* and *Burt*, 1 *P. Wms.* 679., it was ruled, that an estate devised in fee should not be charged with a legacy where the personal estate was exhausted by a specialty debt. The whole law upon this subject is thus collected in a note to that case by Mr. *Cox.*

"It being the object of a court of equity, that every claimant upon the assets of a deceased person, shall be satisfied as far as such assets *can* by any arrangement *consistent* with the nature of the respective claims, be applied in satisfaction thereof; it has been long settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien. *Lanoy* v. Duke of *Athol*, 2 *Atk.* 444. *Lacam* v. *Mertins*, 1 *Vez.* 312. *Mogg* v. *Hodges*, 2 *Vez.* 53. If therefore a specialty creditor, whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor, against the real assets, *so far* as the latter shall have exhausted the personal assets in payment of his debt. *Anon.* 2 *Chan. Ca.* 4. *Sagitary* v. *Hyde*, 1 *Vern.* 455. *Neave* v. *Alderton*, 1 *Eq. Ca. Ab.* 144. *Wilson* v. *Fielding*, 2 *Vern.* 763. *Galton* v. *Hancock*, 2 *Atk.* 436. And legatees shall have the same equity as against assets d[illegible] *Aston*, 2 *Chan. Ca.* 117. *Bowaman* v. *Reeve*, *Pre. Cha.* 578. *Tipping* v. *Tipping*, 1 *P. Wms.* 730. *Lucy* v. *Gardiner*, *Bunb.* 137. *Lutkins* v. *Leigh*, *Ca. Temp. Talb.* 54. So where lands are subjected to the payment of *all* debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of personal assets, *Hazlewood* v. *Pope*, 3 *P. Wms.* 323. So where legacies by will are charged

on the real estate, but not the legacies by codicil, the former shall resort to the real assets upon a deficiency of the personal assets to pay the whole, *Hyde* v. *Hyde*, 3 *Chan. Rep.* 83. *Masters* v. *Masters*, 1 *P. Wms.* 422. *Bligh.* v. Earl of *Darnley*, 2 *P. Wms.* 620. But from the principles of these rules it is clear, that they cannot be applied in aid of one claimant so as to defeat the claim of another: and therefore a pecuniary legatee shall not stand in the place of a *specialty creditor* as against land devised, though he shall as against land descended, *Clifton* v. *Clifton*. *Hazlewood* v. *Pope*. *Scott* v. *Scott*, *Ambler* 383. But such legatee shall stand in the place of a mortgagee, who has exhausted the personal assets to be satisfied out of the mortgaged premises, though specifically devised, *Lutkins* v. *Leigh*. *Ca. Temp. Talb.* 53. *Forrester* v. Ld. *Leigh*, *Amb.* 171. For the application of the personal assets, in case of the real estate mortgaged, does not take place to the defeating of any legacy. *Oneal* v. *Mead*, 1 *P. Wms.* 693. *Tipping* v. *Tipping*, 1 *P. Wms.* 730. *Davies* v. *Gardiner*, 2 *P. Wms.* 190. *Rider* v. *Wager*, 2 *P. Wms.* 335. And it is to be observed, that none of the rules above mentioned subject any fund to a claim to which it was not before subject, but only take care that the election of one claimant shall not prejudice the claims of the others, 2 *Atk* 438. 1 *Vez.* 312. So in *Robinson* v. *Tonge*, *ac.* 15 *Oct.* 1739. *A.* seised of freehold and copyhold lands, mortgaged the same, and died indebted by mortgage, and on several bonds. The specialty creditors insisted that the Court, in marshalling the assets, should cast the whole mortgage upon the copyhold estate, in order that the specialty creditors might have the benefit of the whole freehold estate. But the Court said that copyhold estates were not liable, either in law or equity, to the testator's debts, further than he subjected them thereto; and ordered, that the copyhold estate should bear its proportion with the freehold estate, for payment of the mortgage; and should not be liable to make satisfaction for the specialty debts. *Reg. Lib. B.* 1738. fol. 483. It is now settled, that the Court will not marshal assets in favor of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in land. *Mogg* v. *Hodges*, 2 *Vez.* 52. *Attorney-General* v. *Tindal*, *Amb.* 614. *Foster* v. *Blagden*, *Amb.* 704. *Hillyard* v. *Taylor*, *Ambler* 713.

Where a legacy is payable out of a mixed fund of real and personal estate, payable at a future day, and the legatee dies before the day of payment, *quære*, Whether the Court will marshal assets so as to turn such legacy upon the personal estate? in which case it would be vested and transmissible; whereas, as against the real estate, it would sink by the death of the legatee. *Vide Prowse* v. *Abingdon*, 1 *Atk.* 482. *Pearse* v. *Taylor*, *Trin. Vac.* 1790, before Ld. *Thurlow*. As to the right of a wife to have assets marshalled in respect of her paraphernalia, *vide Tipping* v. *Tipping*, 1 *P. Wms.* 729. *Tynt* v. *Tynt*, 2 *P. Wms.* 542.

LIBELLUS FAMOSUS.

See 4 Co. 14, 15. 5 Co. 125, &c. 9 Co 53, 59. 3 Inst. 174. Mo. 813, 627. 1 Sid. 242. 2 Show. 468, 471, 488. Post. 646. S. C. Ante 324. 3 Salk. 226. Cases B. R. 218. Holt 422. Carth. 407.

DOMINUS REX *v.* BEAR.

[Hill. 10 W. 3. B. R. 1 Ld. Raym. 414. S. C.]

The whole libel need not be set forth in indictment, but if any part qualifies the rest, it may be given in evidence. See 5 Mod. 163, 164, &c. 1 Sid. 270, 271.

INDICTMENT for composing, writing, making, and collecting several libels, *in uno quorum continetur inter alia juxta tenorem & ad effectum sequent'*, and then sets out the words. Upon not guilty pleaded, the jury found the defendant guilty as to the writing and the collecting *prout in indictamento supponit' & quoad omnia alia prœter scriptionem & collectionem* not guilty. An exception was taken in arrest of judgment, that *inter alia* shewed there was something else which perhaps might, if it appeared, qualify the rest.

5 Co. 125. 1 Mod. 58. Hard. 470. Faresly 91. 1 Danv. 156. 1 Vent. 25. 2 Sid. 163. 4 Co. 14. b. Hard. 223. Yelv. 117. 1 Lev. 240. 1 Bulst. 151. 2 Brownl. 100. 1 Saund. 131. 2 Saund. 369. 3 T. R 429. n. Mod. Cases 102, 103. Post 660. Doug. 184.

Et per Cur. Non allocatur; for if that had been the case, the defendant could not have been found guilty; and regularly, where a man speaks treason, *God save the king* will not excuse him. *Vide* 2 *Ro. Rep.* 89. And it is not necessary to set forth all the libels; but if any thing qualify that which is set forth, it must be given in evidence.

2dly, It was agreed, *ad effectum sequentem* of itself had been naught; for the Court must be judge of the words themselves, and not of the construction the prosecutor puts upon them; but *juxta tenorem sequent'* imports the very words themselves. *Vide Co. Entr.* 116. *Reg.* 169. For the *tenor* of a thing is the transcript: And *Rokesby* said, the words *ad effectum* were loose and useless words; and the words, *juxta tenorem*, being of a certain and more strict signification, the force of the latter was not hurt by the former, for *utile per inutile non vitiatur; quod Holt*, C. J. *concessit;* and the case of *Saltashe*, *H.* 33 & 34 *Car.* 2. *B. R. Rot.* 1154. was remembered and agreed; and all were of opinion, that the words *ad effectum* were corrected by the words *juxta tenorem.*

Copying a libel is criminal. 5 Mod. 165.

3dly, It was held, that the finding guilty of bare writing and collecting was criminal, not but that collecting had been better out of the case; for, *per Holt*, C. J., bare copying out of a libel, by one that is neither contriver nor composer, is highly criminal; and as to this the Chief Justice said, the essence of a libel consists not in the infamous matter, for if a man speaks such words, unless the

Essence of a libel consists in the writing.

Bl. Rep. 386. Bur. 2696. 5 Mod. 167. Gilb. Law of Evidence, by Lofft. 835.

words be put in writing, he is not guilty of a libel; but the nature of a libel consists in putting this infamous matter into writing; and therefore if *Bear* writ such matter, he is a libeller; for it was not a libel till it was written; and in all cases where a man does that act, which makes a thing to be what it is, he is and must be construed to be the doer of that thing. This is seen in all offences, from the highest to the lowest.

If *H.* contrives any treasonable matter, and another writes down the contrivance, the writer is as guilty as the inventor. Where an act of parliament makes *sodomy* felony, and says nothing of the abettors, if *B.* should stand by and hold the door while *A.* committed *sodomy*, *B.* would be as guilty of felony as *A.* So in 3 *Inst.* 59., where an act of parliament makes any thing felony, though nothing be said of the accessaries in the statute. So in the lowest offences, where there are no accessaries, but all are principals, as if *H.* should hold *A.* while *B.* beats him, he is guilty of the battery.

So in the principal case, he that does that without which the thing could not be what it is, *viz.* a libel, cannot be construed to be innocent.

He that writes a libel is the contriver. 3 Mod. 68. 1 Hawk. c. 73. s. 10.

It is objected, that it is held in 9 *Co.* 59. *Lamb's* case, that a libeller must be either the *contriver*, *procurer*, or the *publisher*. But this ought to be expounded by *Moor* 813. where the writer is held to be in law a *contriver;* and then that ground of my Lord *Coke's* may be admitted to be law; otherwise it will be doubtful; for if that case be looked into, the question there was about the publication of a libel; and it was held, that writing the copy of a libel was not a publication, but only evidence of a publication; but there was no question made how far he was guilty of libelling; and for the matter of publication, the bare having a libel is not a publication. If a libel be publicly known, having a written copy of it, is an evidence of a publication; but otherwise where it is not known to be published.

Having a written copy of a known libel, is evidence of a publication. See 5 Mod. 165.

3 Mod. 68.

It is objected, that writing a libel may be a lawful act, as by the clerk that draws the indictment, or by a student who takes notes of it; and so the defendant's might be a lawful writing.

Where a matter is unlawful in general, a general allegation shall be so taken.

To this the Chief Justice answered, that the matter abstractedly considered is unlawful, therefore the general finding shall be taken to be criminal; and that if the writing was innocent, as in the case objected, there ought to be a special finding of these particulars, which distinguish and excuse it. If an action be brought on the statute of maintenance, it is sufficient to say, *quod manutenuit;* yet in some circumstances a man may lawfully maintain a suit, as an attorney or near relation; yet because it is unlawful

Bur. 2667, 2687. 2 bl. Rep. 1038.

in abstracto, that general allegation is enough, and shall be understood of an unlawful maintenance; and farther, it cannot be understood of such a writing; for if an *officer or student does it, it is no libel because it is not done *ad infamiam* of the party, but to bring the offender to punishment, and it is only *tenor libelli*, and upon such evidence the defendant could not be found guilty. The case in 3 *Inst.* 174. is a strong case: In that case *J. de Northampton* is charged with writing only, and there is no mention made of a publication.

I am not under any necessity of giving my opinion, whether writing a copy of a libel be writing of a libel? for if it be not, then jury having found the defendant guilty of writing a libel, he must be taken to be guilty of writing the original, and a copy could not be given in evidence. On the other side, if the copy of a libel be a libel, then the writing of it is a great offence? But that people may not go away with a notion, that writing of a copy, though by one that has no warrantable authority, is not libelling, the Chief Justice said, that such a copy contained all things necessary to the constitution of a libel, *viz.* the scandalous matter, and the writing; and it has the same pernicious consequence; for it perpetuates the memory of the thing, and some time or other comes to be published; therefore he held, that writing a copy of a libel was writing a libel; and if the law were otherwise, men might write copies and print them with impunity.

Writing a copy of a libel without authority, is writing a libel. 5 Mod. 164, 165. Pop. 139. 12 Rep. Dr. Wooton's Case. 3 Inst. 134. 1 Vent. 31.

Further, the Chief Justice said, that the defendant had great favour in the verdict, for when a libel appears under a man's own hand writing, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. A man could have no temptation to write such libels, but rancour against the government.

Lastly, it was objected, that the defendant being found guilty of collecting and writing, and not of making and composing, the verdict is repugnant, or an acquittal; *sed non allocatur;* for making is the genus, and composing and contriving is one species; writing, a second species; and procuring to be written, a third species; so that not finding him guilty of all, but writing only, is finding him not guilty of any species of making, but writing. *Justin. Inst. lib.* 4 *cap.* 4. *par.* 1. *de injuriis*, and *Bract. lib.* 3. *Fitz.* tit. *Coran.* 135. Bare writing was punishable in the Star-chamber. *Hob.* 62, 215. 12 *Co.* 35. *Helt* 4. *Moor* 421. *Dy.* 372.—Judgment *pro rege*.

Cro. Car. 125.

LIMITATIONS.

Far. 49. See 1 Saund. 37. 2 Saund. 66, 120. 125. 1 Sid 305. Hutt. 109. Cro. Car. 163, 513, 535, 5 Mod. 426. 2 Mod. 71, &c. Vid. 1 Lev. 149, 143. S. C. Carth. 136. 1 Show. 98.

1. HALL *v.* WYBOURN.

[Trin. 1 W. & M. Rot. 130. B. R.]

Defendant's being beyond sea does not avoid the statute of limitations. Comber. 190. 2 Mod. 311. Note; the law is now altered by stat. 4 & 5 Ann. c. 16. 1 Sid. 465. 2 Vent. 256. 3 Lev. 21, 283, 367. 6 Mod. 240. Show. 99. Jon. 253.

IN bar of the statute of limitations, the plaintiff replied, that the defendant was beyond sea, and it was held no plea, for the plaintiff might either file his original, or out-law him; and in one *Bynton*'s case, it was held by *Bridgman*, C. J. that though the courts of justice were shut up so as no original could be filed, yet this statute would bar the action; because the statute is general, and must work upon all cases which are not exempted by the exception.

2. BUDD *v.* BERKENHEAD.

[Trin. 2 W. & M. B. R.]

In replication to avoid the statute of limitations, the continuances must be shewn. See 2 Show. 79. 3 Mod. 111, 112. 1 Lord Raym. 435. 2 Str. 719. 2 Atk. 395. 1 Wils. 167.

DEFENDANT having pleaded the statute of limitations, the plaintiff replied in avoidance, that he sued out an attachment returnable *Mich.* 34 *Car.* 2. *Et quod superinde taliter processum fuit*, that the defendant in *Michaelmas* term, 2 *Jac.* 2., appeared, *&c.* *Et per Cur.* This pleading is not good; it must be shewn that there were continuances till the time of declaring, and a *taliter processum* is not sufficient to shew a matter before declaration, though it has been held so for matters after.

Bull. N. P. 151. 3 T. R. 662. 1 Espinasse 157.

3. COVENTRY *v.* APSLEY.

[Mich. 3 W. & M. Rot. 411. B. R.]

Imprisonment, statute of limitations pleaded to part. Plaintiff ought to reply, it was one continued duress. Vide post. pl. 11. Comber. 26.

TRESPASS for imprisoning him, and detaining him in prison from 32 *Car.* 2., till the 3d. of *April*, 4 *Jac.* 2. The defendant pleaded as to all, till 34 *Car.* 2., such a day, *non cul. infra quatuor annos;* and as to the rest, a plaint and a *capias* issued. The plaintiff demurred. *Et per Cur.* Though the imprisonment be complained of as one continued imprisonment, yet the defendant may di-

vide the time, and plead the statute as to part, and the plaintiff may reply the continuance; therefore as to this, judgment was given against the plaintiff upon his demurrer, but for him as to the rest; because the *capias* was awarded by the Court *ex officio*, and it did not appear that the defendant meddled in it. Salk. 638. Bull. N. P. 24. 2 H. Black. 16.

[* 421]

*4. CARY & UX. *v.* STEPHENSON.

Comber. 311. S. C. called Carry & Ux. ver. Stephens. Skin. 555.

[Pas. 6 W. & M. B. R. Intr. Hill. 5 W. & M. Rot. 37.]

A. received the intestate's money, and afterwards administration was granted to B. The cause of action accrues by the administration. See 1 Chan Cases 152. 2 Chan. Cases 217. & post. pl. 9. 4 Mod. 376. Carth. 335. S. C. 2 Saund. 150. called Curry v. Stephenson. 2 Cro. 60, 61. Holt 98. Gouls. 171. Vide 2 Str. 907. Fitzg. 81.

H. was indebted to *A.* who died, *B.* received the money, and afterwards the plaintiff's wife took out letters of administration to *A.*, and within six years after the receipt of the money, brought an *indebitatus assumpsit* against *B.* as for money had and received to the use of him and his wife; the defendant pleaded *non assumpsit infra sex annos;* the plaintiff replied the special matter; and, upon demurrer, the Court were of opinion, that the statute could be no bar, because the plaintiff's title commenced by taking out letters of administration, and this was not a cause of action in the intestate; but they thought it hard to make this so much money received to the plaintiff's use, when at the time of this receipt, he was not administrator. *Note;* There was a faulty replication, and the Court advised the plaintiff to bring a new action, and so the matter went off.

5. STOKES *v.* BERRY.

[*At the Summer Assizes at* Lincoln, 1699. *Coram* Holt, *C. J.* 1 Ld. Raym. 741. S. C. named Stocker *v.* Berney.]

Twenty years possession is a good title in ejectment for the plaintiff, as well as defendant. Holt 264. S. C. 1 Mod. Cas. 287. Post. 685.

IF *A.* has had possession of lands for twenty years without interruption, and then *B.* gets possession, upon which *A.* is put to his ejectment, though *A.* is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession. Ruled *per Holt*, C. J. The same point was ruled by *Holt*, C. J. at Lent assizes for *Bucks*, 12 W. 3., because a possession for twenty years is like a descent, which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment.

S. C. Far. 12. vide ibid. 5.

6. GREEN *v.* RIVETT.

[Pas. 1 Ann. B. R. Intr. Mich. 13 W. Rot. 316. Ld. Raym. 772. S. C.]

[* 422]

Plea of the statute of limitations to be favoured. Vide 1 Mod. 31, 89, 268. 2 Mod. 71, 311. 1 Vent. 90. 2 Saund. 125, 127. 1 Saund. 36, 37, 120, 127. 2 Saund. 120, 121, 125, 162. 2 Mod. 72. Comberb. 70. 1 Show. 354. 2 Show. 79, 126. 3 Salk. 227. Vide 2 Bl. Rep. 1131. 1 Bl. R. 286, 215. 2 Bur. 958.

INDEBITATUS assumpsit laid several ways; the defendant pleaded *actio non, quia dicit quod billa prædict. exhibit fuit* 20 *die Junii & non antea, & quod ipse ad aliquod tempus infra sex annos ante exhibitionem billæ prædict. Non assumpsit, &c.* The plaintiff replied a bill of *Middlesex*, tested *die lunæ prox' post tres septimanas, &c.* returnable the same day, whereupon was returned *non est inventus*, and continued down by *vic. non nisit breve & præcept. sicut alias*; to this it was * demurred, and judgment given for the defendant; for there cannot be such a bill of *Middlesex* as this, which is returnable the very day of the *teste* (*a*); and the statute of limitations, on which the security of all men depends, is to be favoured.

(*a*) By the *report* in Ld. *Raym.* it seems that a bill of *Middlesex* cannot be returnable the same day that it is sued out; but the contrary is ruled. 4 *T. R.* 611.

S. C. 1 Salk. 339.

7. HUNT *v.* BURN.

[Hill. 1 Ann. B. R. Vide *the State of this Case, tit.* Fines, pl. 5. vol. 1. p. 339.]

H. barred of his formedon, may take advantage of a right of entry. 1 Lutw. 779. 1 Salk. 341. Lutw. 813.

UPON the question in this case, whether it appeared by the verdict, that the issue in tail was barred of his *formedon* by 21 *Jac.* 1.? the Court held, that the verdict was insufficient; and that it should have found that no *formedon* was brought, else the Court could not intend but that it was brought; for this is matter of bar, which should come on the defendant's part to shew; and this act is not penned as the statute *de finibus*: It is enough in that case to find a fine, and you need not find that the party claimed or entered not, for that comes in by way of proviso; but here it is part of the body of the act.

2dly, They held, that supposing him barred of his *formedon*, yet he is not thereby hindered to pursue his right of entry, which accrued to him by the death of tenant for life; for this is a new right which he had not before: That where a man releases his right, he cannot pursue his action or remedy; but if a man has a right, and several remedies, the discharge of one is not a discharge of the other, and that the statute of 4 *H.* 7. enures and operates

by way of bar to the right, which answers *Saul* and *Clerk*'s case, *Jones* 210, 211. But the 21 *H.* 8. and the 21 *Jac.* 1. operate by way of bar to the remedy, and the word *right* there is right of entry (*a*).

(*a*) This case was affirmed in *Dom. Proc.* 1 *Brown P. C.* 53.

8. Heyling *versus* Hoskins. Vide *this Case, title* Action sur le Case sur Assumpsit, pl. 19. vol. 1. p. 29.

9. GOULD *v.* JOHNSON.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 833. S. C. Pleadings and Record, 3 Ld. Raym. p. 7.]

ASSUMPSIT, That in consideration that the plaintiff, at the defendant's request, would receive *A.* and *B.* into his house *ut hospites*, and diet them, the defendant promised, *&c.* *Non assumpsit infra sex annos* was pleaded; the plaintiff demurred; and held no plea; for the defendant cannot in such case plead *non assumpsit infra sex annos*, but *actio non accrevit infra sex annos;* for it is not material when the promise was made, if the cause of action be within the six years; and the dieting might be long afterwards; and though it appears upon the face of the declaration, that the cause of action did not arise within six *years; yet the defendant shall not take advantage of that, without pleading; because there might be an original sued out, which the plaintiff cannot otherwise shew than by way of replication, upon the defendant's putting him upon it.

Where the duty arises on consideration executory, the defendant must plead quod actio non accrevit, &c. Vide ante pl. 4. 2 Show. 79, 126. 1 Mod. 71, 268. 2 Saund. 66, 125. 1 Saund. 36, 37. 1 Vent. 89. 2 Keb. 674. 1 Lev. 298. S. C. Ante 25. Far. 143. Holt 34. See 1 Mod. 71, 89, 268, 269. 2 Mod. 311. 1 Lev. 48, 111. 2 Saund. 127.

1 Lev. 287, 298. 2 Mod. 312. 1 Vent. 89. 1 Sid. 465. Bur. 1281. 3 Atk. 71.

[* 423]

10. READING *v.* ROYSTON.

See Faresl. 5 & 12.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 829. S. C.]

ONE seised in fee, having issue two daughters, devised his land to his grandson by his eldest daughter, in fee; the eldest daughter being dead at the time of the devise: The grandson died without issue, and the heir of the grandson being the heir on the part of the father, and the heir of the other coparcener, entered into the land, and took the profit by moities for twenty years together, thinking, according to the opinion of Sir *Matthew Hale* in his younger years, (who was their counsel,) that the devise was

Statute of limitations runs not against heirs, unless actually ousted or disseised. S. C. Ante 242. Pre. Ch. 222. Vi. 5 Bur. 2064. Cowp. 217.

Co. Lit. 163. b. 1 Co. 93, 94. b. 1 And. 69. Owen 65.

void for one moiety. Now the mistake being discovered, the heir of the grandson brought an ejectment against the heir of the other coparcener; and upon a special verdict found, it was objected in his behalf, that the devise was void as to one moiety; but this being over-ruled, (*quod vide* title *Discent. pl.* 3. *vol.* 1. *p.* 242.) it was then objected, that the bringing of this ejectment against the heir of the other coparcener, for this moiety, admitted the plaintiff to be out of possession for twenty years, and then he was barred by the statute of limitations. *Sed per Cur.*

Ante 392. Co. Lit. 199, 243. 3 Bl. Com. 170. Com. Dig. Seisin, F.

The statute of limitations never runs against a man, but where he is actually ousted or disseised; and true it is, one tenant in common may disseise another; but then it must be done by actual disseisin, and not by bare perception of profits only (*a*); but here the difficulty is not so great; there is no tenancy in common in this case, for the heir of the grandson had the whole by devise, and the other is a mere stranger; and where two men are in possession, the law will adjudge it in him that hath the right. A man may be tenant in common by prescription, yet he may not be tenant in common by wrong; nor can a man be disseised of an undivided moiety; therefore the bringing the ejectment admits nothing; for if a man be seised of the whole, and makes a lease to another of a moiety undivided, and a stranger ousts the lessee, he must bring his ejectment of a moiety; and so if they be both ousted, they must bring several ejectments.

Tenants in common may be by prescription, not by wrong. 2 Saund. 116. 1 Inst. 195, 196, 197, 198. 2 Lev. 27. Cannot join in ejectment. 1 Lev. 109. 5 Mod. 25, 26, 27. Show. 342.

(*a*) *Per* Ld. *Mansfield*, in *Fisher* v. *Prosser*, *Cowp.* 218., The possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant; nor indeed is refusal to pay of itself sufficient, without denying his title. But if, upon demand by the co-tenant of his moiety, the other refuses to pay, and denies his title, saying, he claims the whole, and will not pay, and continues in possession, such possession is adverse, and ouster enough. And in the same case it was held, that a jury might presume actual ouster from an undisturbed and quiet possession for a great length of time, *ss.* 36 years. *Vide Espinasse* 456. 1 *Atk.* 493. 1 *Bl. Rep.* 677. 2 *Bl. Rep.* 690. 1 *Salk.* 391.

S. C. 6 Mod. 240. Rep. A. Q. (11 Mod.) 38.

11. BLACKMORE v. TIDDERLY.

[Hill. 3 Ann. B. R. 2 Ld. Raym. 1099. S. C.]

[* 424]

Not guilty within six years, is ill in trespass. Vide ante, pl. 3. 6 Mod. 5, 12, 99. Faresl. 99.

IN *trespass* for assault and battery, the defendant pleaded *non culp. infra sex annos*, by mistake, and not according to *the statute, which is but four years. The plaintiff demurred, and after argument it was adjudged an ill plea; for if it be considered as at common law, there was

no such plea; if on the statute, the act is not pursued, and the plaintiff could not take issue on it, *quod est culp. infra sex annos* is an issue immaterial; because it may be, the jury might find him not guilty *infra quatuor annos*, but guilty *infra sex annos*. Judgment for the plaintiff. Vide sta. 4 Ann. c. 16. s. 12.

12. HIDE v. PARTRIDGE.

[Mich. 4 Ann. B. R 2 Ld. Raym. 1204. S. C.]

LIBEL was for mariners' wages in the Admiralty Court, and the defendant there pleaded the statute of limitations, *viz.* that no cause of action accrued within six years *prox' ante tempus mentional. in libello;* and it was over-ruled there. And now upon a motion for a prohibition it was urged, that mariners' wages were suable in the Admiralty by indulgence only, and not of right; that at common law, the statute would be a good plea: On the other side it was said, the statute extended only to courts at common law; that it was not pleadable to a proceeding in the Spiritual Court *pro violenta manuum injectione super clericum:* But a prohibition was denied, because the statute was ill pleaded; but the plea was afterwards amended: And *Holt*, C. J. said, it was strange that the same matter, well pleaded, should be a defence in one court, and not in another. The statute of limitations is a good plea in Chancery; it is true, it is no plea to a suit *pro violenta manuum, &c.* but that is, because the proceeding is *pro reformatione morum*, and not for damages; and so it is at common law, it is no plea to an indictment for trespass, otherwise in an action. *Adjournat.* (*a*)

Statute of limitations pleadable to a suit in the Admiralty for mariners' wages. Quære. Suits for mariners' wages. 1 Salk. 31 to 35. 6 Mod. 11, 12, 25, 79. Post. 548. Mod. Cases 424. S. C. 3 Salk. 227. Holt 428. Rep. A. Q. 43. 1 Chan. Cases 152. 2 Chan. Cases 217. 2 Saund. 124, 126. 3 Mod. 244. 1 Lev. 298. 4 Mod. 105. 1 Sid. 465. 1 Vent. 146, 343. Raym. 3. Winch. 8. 6 Mod. 238.

(*a*) By stat. 4 and 5 *Ann.* ch. 16. these suits must be commenced within six years after the cause of action.

13. MATTHEWS v. PHILLIPS.

[*Cite and agree* Mich. 6 Ann. B. R.]

DEBT was brought in the Palace Court, and after some proceedings there, the six years expired; the defendant sued a *habeas corpus*, and removed the cause into *B. R.*, where the plaintiff declared *de novo*, and the defendant pleaded, that the cause of action did not accrue within six years before the *teste* of the *habeas corpus;* and this was held to be a good plea, but that the plaintiff might reply the suit below, and shew that to have been within the six years; not that this suit was a continuance of the suit below, but that the plaintiff had rightfully and legally pursued his right; and it should not be in the power

Action removed by habeas corpus, statute of limitations pleaded above, plaintiff may reply, the suit below was within six years. See 2 Show. 79, 126. 1 Sid. 228. 1 Lev. 143. See 5 Mod. 426. 1 Mod. 89. 2 Lev. 166. Lutw. 258, 263,

265. 2 Lord Raym. 1429. S. P. 2 Str. 719. Bull. N. P. 151. Fitzg. 170, 289.

of the defendant to defeat or hinder him of a remedy, without any default; as where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor*.

* *Nota.* In debt upon an award, the statute of limitations is no plea, 2 Saund. 65, 67. Nor in a writ de rationabili parte bonorum. Hutt. 109. Nor in an action on the case for conspiring to indict, &c. Cro. Car. 163. Nor in debt for an escape, 1 Saund. 37. 1 Sid. 305. Quære, Nor in case for money levied on a fieri facias by the sheriff, 1 Mod. 245. Nor to an action for a false return of rescous. Smith versus Robinson, in C. B. Trin. 8 W. 3. rotulo 1819. This note is copied from the MS. Reports of Judge Blencowe.—For a further enumeration of excepted cases, *vide Com. Dig. Temps. G.* 9. 6th vol. 3d edit. pa. 339.

See 3 Lev. 264. 1 Roll. R. 365. Moor 576. 5 Mod. 75, 93, 160, 440. 6 Mod. 69, 123, 244, 177. Hard. 56, 210 Cart. 68, 114, &c. S. C. 1 Salk. 76. Vide post. 498.

LONDON, AND THE CUSTOMS THEREOF.

1. ARNOT v. BROWN.

[Mich. 7 W. 3. B. R.]

Court of Aldermen's power concerning new lights, by 19 Car. 2. c. 3. was only during the rebuilding of the city. Stopping lights, see 1 Sid. 167. Poph. 170. 9 Co. 58. Hob. 131. Hutt. 136. 1 Lev. 239, 248. Raym. 87. 1 Mod. 55. 2 Lev. 193. 1 Vent. 274. 6 Mod. 166, 193, 314, 382, 386. 1 Lutw. 382, 386.

ARNOT and *Brown* were owners of two contiguous houses. *Brown* had lights in his house towards *Arnot's* yard, and *Arnot* made up blinds. The Court of Aldermen, upon 19 *Car.* 2. *c.* 3., ordered they should be abated; but a prohibition was granted in *B. R.*; for whatever they may do in their inner court by *quod permittat*, where they have power to determine real actions; it is plain that the Court of Aldermen have no power in this summary way, unless by 19 *Car.* 2. *c.* 3., and that gave them only a temporary power during the rebuilding of the city. While the city was rebuilding they had power to assign lights; but by being once assigned, the party gained a legal title to them, and may maintain an action at common law for the obstruction, and the Court of Aldermen have no farther power. *Vide Residuum*, 6 *Mod.* 244.

2. DOMINA REGINA *v.* ROGERS.

S. C. Farsl. 28. See 1 Mod. 35. & prox. pag. 5 Mod. 75, 94, 440. 2 Lev. 200. 6 Mod. 124. Holt 331.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 777. S. C.]

Custom to punish by information in the Court of Aldermen, for assault and contemptuous words of an alderman in execution of his office, is good. Otherwise, if to disfranchise.

UPON a *certiorari*, the custom of *London* was returned, *viz.* That if any citizen speaks contemptuous words of an alderman, or assaults him in the execution of his office, an information shall be exhibited against him in the name of the common serjeant in the Court of Aldermen, and that they should proceed against him to fine him; and that, at a wardmote held by Sir *Robert Jeffreys*, the defendant assaulted him, and said, *I have as much to do here as you; you think sure you are among your Bridewell birds, but you are mistaken;* for which an information was exhibited [426] by the common serjeant. *Et per Cur.* It had been doubtful if the offence had been by words only, because no indictment lay at common law, but he is to be bound to good behaviour; yet for assault he is punishable, and that may be by information there by the custom, as well as in *B. R.* by the course of the Court, though the regular course at common law is by indictment. 2dly, The Court held, that the information lay in the Court of Aldermen, though an alderman was grieved; otherwise of the mayor, for he is an integral part, without which the court cannot be held, but the other may be severed, and he must not sit; so the mayor and aldermen may grant to an alderman, but the aldermen and city cannot grant to the mayor: But the Court held, that a custom to disfranchise, for contemptuous words spoken of an alderman, was void, according to 2 *Lev.* 200.

Post 697. 3 Cro. 78. 1 Vent. 16. 1 Sid. 65. 1 Mod. 35. 3 Mod. 139, 133. Farsl. 28. 6 Mod. 124. 4 Mod. 341, 2. 1 Vent. 302, 327. 3 Keb. 764, 714, 799, 811. 2 Keb. 594. 2 Lev. 200. 1 Vent. 16, 327. 2 Jo. 229. 2 Cro. 58. Hob. 62. 8 Co. 116. 3 Cro. 73. Sheph. Abr. 436. Lev. 398. Corporations 13, 24.

CUSTOM OF LONDON CONCERNING ORPHANS AND FREEMEN'S ESTATES.

Vide Com. Dig. Guardian, G. 2. vol. 4. 3d edit. pa. 284.

IF a freeman of *London* has no wife, but has children, the half of his personal estate belongs to his children, and the other half the freeman may dispose of; so if the freeman has a wife and no children, half of his personal estate belongs to his wife, and the other half he may dispose of (*a*). But if a freeman hath a wife and children, one third part belongs to the wife, and another third part to the children, and the freeman may dispose of the other third part. And if such freeman dies intestate, the custom affects only two thirds, and the remaining third is subject to the statute of distributions, and so dividing the whole

See 1 Cro. 347. 1 Lev. 227. Raym. 4, 116. 1 Keb. 868. 2 Lev. 32, 130. 1 Mod. 77, 78, &c. 2 Show. 174, 409, 467. 2 Chan. Cases 170, 161. 1 Chan. Cases 199, 285, 310. Ven. 134. con. 465. Skin. 26, 41.

(*a*) *Adm.* 1 *P. Wms.* 341.

into ninths, four ninths belong to the wife, and five ninths belong to the children.

Custom extends only to children, not grandchildren.

If a freeman of *London* has two sons, and the eldest son dies leaving a son, and then the freeman dies, the grandchild, though in law a representative of the son, who never was advanced, has no part by the custom; for the custom of *London* extends only to the children, and not to the grandchildren; *per Northey;* and so it has been certified by the recorder into Chancery.

Hotchpot extends only amongst children. Vern. 397. 2 Wms. 526.

If a freeman of *London* has but one child, and he has received some portion from his father, and the father dies, leaving this child and a wife, the child shall have his full orphan's part, without any regard to what he has already received; for that advancement in part is only to be brought into hotchpot with children, and not with others. *Per* Sir *Edward Northey.*

Where it appears under the father's hand how much a child has received, the Court will judge whether full advancement, or not, Vern. 89, 216. Vide act of parliament 11 Geo. 1., by which power is given to freemen to dispose of personal estates by will.

If a freeman of *London* has advanced any of his children with a portion; yet if it appears what that portion was by any writing under the father's hand, or by the father's will, or his marriage-settlement, and by the said will or settlement it is said, that the said portion is or was in full of his child's part by the custom; yet this child shall come in for the customary * part of the rest of the father's personal estate, bringing the portion already received into hotchpot; otherwise it is, if it does not appear under the father's hand what the advancement was.

[* 427]

Vide 4 Co. 124, &c. 6 Co. 69. 8 Co. 170. 9 Co 31.

LUNATIC, IDEOT.

1. HARD'S *CASE.*

[Mich. 8 Will. 3. B. R.]

Maintainable by the parish where the father is settled, not where born.. Vide post. 528, 485. pl. 43. Comberb. 380, 381. Mod. Cases 87.

SIR *Bartholomew Shower* moved to quash an order of justices, for removing an ideot to the place of the last legal settlement of his father, comparing it to the case of a bastard, who is to be maintained by the parish where he is born. *Sed per Holt,* C. J. The father of an ideot ought to maintain him, and if he cannot, the parish or place where his father is settled. There is no difference between an ideot and any other poor child. The case of a bastard

differs, for the reason of that is, becaue he has no father, or rather none that the law looks upon as such; and therefore, till 18 *Eliz. c.* 3., the parishes where they were born were bound to maintain them. *Adjournat.*

2. THOMPSON *v.* LEACH. S. C. post. 565. 576, 675.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 313. S. C. Comyns 45. S. C.]

A. Tenant for life, being *non compos*, with remainder to his first son in tail, remainder to *B.* in fee, surrendered by deed of surrender to *B.* before he had a son; this deed of surrender was held absolutely void, and the contingent remainder not destroyed.

His deed is void. Vide Lutw. 1188. S. C. Eq. Ab. 178. p. 3. 3 D. 164. p. 13. 3 Salk. 300. 1 Show. 296.

Cases B. R. 175. 3 Mod. 296, 301. 3 Lev. 284. Cases in Parl. 150. 2 Vent. 198. Comb. 438, 468. Carth. 211, 250, 435. Holt 357, 623, 665. Fearne 467, (243).

MANDAMUS.

Vide 1 Lev. 23, 65, 75, 91, 119, 123, 148, 187, 162. 2 Lev. 14, 18, 238. 3 Lev. 309. 1 Mod. 82. 3 Mod. 265, 332, &c. 4 Mod. 233, 234, 260, 281, 368. See pag. 430. pl. 8.

1. ANONYMOUS.

[Mich. 8 Will. 3. B. R. S. C. 1 Ld. Raym. 125., by the name of Green *v.* Pope.]

IN an *action on the case* in the Common Pleas, for a false return of a *mandamus*, judgment was given for the plaintiff upon demurrer; and now Serjeant *Pemberton* came into *B. R.* and prayed a peremptory *mandamus;* but it was denied; for *per Holt*, C. J. Every *mandamus* recites the fact, *prout constat nobis per recordum.* How can we say that, in this case, we cannot take notice of the records of the Common Pleas? You might have brought your action here.

No peremptory mandamus upon an action for a false return brought in C. B. S. C. 5 Mod. 316. Comb. 400, 419. Holt 438.

DOMINUS REX v. THE MAYOR AND BURGESSES OF WILTON.

[Mich. 8 Will. 3. B. R. S. C. 1 Ld. Raym. 225., by the name of Rex v. Chalke.]

Want of summons is no objection, if the person appeared and was heard. Vide post. 435. S. C. 5 Mod. 255, 257. Bur. 731.

A *Mandamus* issued to restore *Elias Chalk* to the place of a burgess of *Wilton*, to which was returned a custom for the mayor and burgesses to remove for misbehaviour: They then set forth several instances of misbehaviour; and that he being thereupon fully heard to all that was objected in the common council of the mayor and burgesses, and it being fully proved upon him, they turned him out. It was objected, that it was not said he was summoned. *Vide Style* 51, 446, 452. 3 *Bulst.* 189. 2 *Keb.* 489. *Per Cur.* The end of the summons is, that he may be heard for himself, and therefore where he has been heard, want of summons is no objection; but this was afterwards determined on other objections.

Vide 4 Mod. 233, &c.

3. DOMINUS REX v. THE MAYOR, &c. OF OXON.

[Mich. 8 Will. 3. B. R.]

Where an officer at will is removed, and the corporation does not rely upon their power, but return a misdemeanor, and that is insufficient, peremptory mandamus shall issue.

[* 429]

A *Mandamus* issued to the mayor and commonalty of *Oxford* to restore *Slatford* to the office of town-clerk; they returned their charter of incorporation, which gives them power to choose a discreet person to be town-clerk, to hold at the will of the mayor and aldermen: the 13 *Car.* 2. *stat.* 2., and the stat. of *W.* & *M.* about taking the oaths, and that the office of town-clerk being *void, they chose *Slatford*, and that he took the oaths of office *coram nobis majore & ballivis;* but did not *coram nobis majore & ballivis* take the oath of allegiance, *per quod* his office became void, & *ea ratione*, &c. Upon which these three points were stirred and settled:

1 Vent. 82. Vide Raym. 212. 2 Saund. 289. 2 Show. 68, 475. 4 Mod 233, 337, 239. 5 Mo 432, 435, &c 3 Mod. 72, 118. Post. 432.

1st. Whether the party that comes in is to take the oaths at his peril, or they are to tender them, and if he refused, whether it must not appear upon the return? *Et per Cur.* He must take them at his peril; the magistrate need not tender to him, but he must tender himself to the magistrate, and demand them; and if it be refused, must sue a *mandamus*, and the magistrate is punishable (*a*); if the law were otherwise, it would be in the power of the magistrate to elude the act in favour of the party.

(*a*) If he does not tender them *ex officio Per Holt. Cumb.* 419.

2dly, Whether it be enough to say, he did not take the oaths before them? And this was held naught; for two justices have a power to administer the oath, and he might take the oath before them.

3dly, Whether a person, that was only tenant at will should have a peremptory *mandamus*? *Et per Cur.* We do not determine whether there ought to be a good cause, or not, for such removal; but suppose it may be without cause, yet still they must determine their will: Now they do not return a determination of his office by their will, as the reason why they do not admit him, but the special matter of his not taking the oaths; therefore, since his office continues and this excuse is insufficient, he ought to be restored. A peremptory *mandamus* was granted. *Vide* Serjeant *Whitacre*'s case.

Str. 674.

4. THE MAYOR OF COVENTRY'S *CASE*.

[Hill. 9 Will. 3. B. R.]

The first writ ought to be returned. Mod. Cases 25. Post 434. Skin. 669. Pal. 455.

A *MOTION* was made for an attachment, for not returning an *alias mandamus*. *Et per Holt*, C. J. In case of a *mandamus* out of Chancery, no attachment lies till the *pluries*, for that is in the nature of an action to recover damages for the delay; but upon a *mandamus* out of this court, the first writ ought to be returned (*a*); yet an attachment is never granted without a peremptory rule to return the writ, and then an attachment goes for the contempt; and in this case a peremptory rule was made.

(*a*) This is expressly required by stat. 9 *Ann.* ch. 20. s. 1. 11 *G.* 1. ch. 4. s. 9.

5. DOMINUS REX *v.* THE MAYOR, &c. OF COVENTRY. [430]

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 391. S. C.]

Custom to remove ad libitum, good, but that must be returned positively. See 4 Mod. 34, 36, 233. 5 Mod. 259, 431, &c. Raym. 235, 430. Post 132 in pede. 1 Vent. 143. 2 Keb. 770, 796

MANDAMUS to restore *J. S.* to be one of the common-council house; the defendants returned, that they were an ancient corporation, and that the king by his letters patent, reciting their customs, amongst which was this of electing persons to be of the common-council house, and removing them *ad libitum*, did grant and confirm all their liberties, customs, *&c.*; and that they by force of the said custom time out of mind used, *&* *secundum formam literarum patentium prædict.* did remove him: And first, it was agreed, that the estate, whether by custom or charter, has this condition annexed to it, that the corporation might

displace him at will, without assigning any cause; but this differed from the case of the recorder of *Bath*, who was appointed by the commissioners for regulating corporations: By their custom they were to choose one learned in the law for a recorder; the corporation turned out the Lord *H.*, and returned, he was not learned in the law: and held good; for whoever put him in, he must be so qualified by the custom, and he might bring an action for a false return, if he be a person learned in the laws. 2dly, This return was held naught, because it did not appear that the corporation had any such power, but only by the recital; whereas they should have returned, they had such a power positively (*a*).

(*a*) In Ld. *Bruce*'s case, 2 *Str.* 819. the Court says, The modern opinion has been, that a power of amotion is incident to the corporation, The same doctrine is recognized in the *King* and *Richardson*, 1 *Bur.* 517., and in the *King* v. *Lyme Regis*, *Doug.* 148.; it was ruled accordingly, that it was not necessary to allege in the return to a *mandamus*, that the corporation at large had a power of amotion. It should, however, be observed, that those cases related to removals for corporate offences, and not to removals *ad libitum.*

6. ANONYMOUS.

[Hill. 10 W. 3. B. R.]

Rule to inspect the charter, in order to make return, denied, before an action on the case brought.

A *MANDAMUS* was granted to admit *J. S.* mayor. It was moved, that the mayor in possession might have a rule to see the charter, that he might be able to make a return; for the other who had sued the *mandamus*, was not rightly elected: But it was denied, for he may return that; and in an action for a false return, shall have a rule to see the charter and take a copy; and it was said, that the Court were always upon that difference (*b*).

(*b*) On a rule to shew cause why there should not be an information in the nature of a *quo warranto*, the Court made a rule for the defendant to inspect the charter and corporation books. *Rex* v. *Hollister*, *Rep. Temp. Hard.* 245. *Vide Rex* v. *Hostmen* of *Newcastle*, *Str.* 1223. *Rex* v. *Purnell*, 1 *Wils.* 239. *Rex* v. *Bridgman*, *Str.* 1203.

See page 428. pl. 1. 4 Mod. 34, 233, 236, 368. Raym. 365.

7. BUCKLEY v. PALMER.

[Trin. 11 Will. 3. B. R.]

After the return falsified, peremptory mandamus is of right. See 6 Mod. 18.

AN action was brought for a false return, and a verdict was for the plaintiff, and a peremptory *mandamus* was moved for, and opposed, because it was a hard verdict, &c. *Et per Holt*, C. J. When an action is brought for a

false return, and that is falsified, we cannot refuse a peremptory *mandamus*. *Sed nota;* This motion cannot be made till four days are past after the return of the *postea;* because the defendant has so long to move in arrest of judgment. *Pas.* 12 *W.* 3. *B. R.* The case of the city of *Exeter*.

Information for a false return, &c. Comber.400. S. C. Holt 440. See 1 Salk. 77, 78. Skin. 670. Str. 983. Str. 697. Vide est. 9 Ann. c. 20.

Com. Mandamus, D. 6. 5th vol. 3d ed. pa. 38.

8. DOMINUS REX *v.* THE BAILIFFS AND BURGESSES OF MALDEN.

[Trin. 11 W. 3. B. R. 1 Ld. Raym. 481. S. C.]

A *Mandamus* issued, reciting *quod cum* they ought to choose yearly two bailiffs, out of such as had not been bailiffs for three years before, *ideo*, they were commanded to choose. They returned their constitution by letters patent to be, to choose two *ex aldermannis*, and that they had chosen two *secundum formam & effectum literatum patentium* generally; and this was held naught, for they ought to deny their constitution to be as is mentioned in the writ, or shew a compliance with the writ; whereas they have acted according to the constitution set forth in the return different from the writ, and do not deny the supposal of the writ; wherefore a peremptory *mandamus* was granted.

Where the return speaks of a constitution different from the writ, it ought to deny the supposal of the writ. 4 Mod. 34, 222, 136, 233. Post. pl. 16. Cro. Car. 133.

9. DOMINUS REX *v.* THE MAYOR, &c. OF ABINGDON.

S. C. post. 332, 699. Carth. 499. Cases B. R. 401.

[Mich. 11 Will. 3. B. R.]

A *Mandamus* was granted to the mayor, bailiffs, and burgesses of the town of *Abingdon:* The mayor made a return and brought it into the crown-office, intending to move to have it filed; and now a motion was made to stay the filing of it, upon suggestion, that this return was made by the mayor and minor part of the bailiffs and burgesses, and against the consent of the greater number, who would have obeyed the writ; and therefore they prayed they might disavow this return and put in another. *Et per Holt*, C. J. Where a writ is directed to a single officer, as a sheriff, and a return is made by a stranger, without his privity, he may any time that term wherein the writ is returned, come in and disavow it, but not after the term. *Dy.* 182. But in this case, where the writ is directed to several, and the mayor, who is the most principal and proper person, returns and brings in the writ, it is not fit that we should examine upon affi-

Mandamus directed to the mayor, bailiffs, &c. Mayor alone may make the return, and the others cannot disavow; but he is punishable, if against the consent of the majority. Vide post. 479, 699, 701. Carth. 499, 500. Comber. 41, 213. 6 Mod. 133. Rep. B. R Temp. Hard. 188.

davits, whether there was the consent of the majority. We will take it, and leave you to punish the mayor for this misdemeanor, if he be guilty; for it is a great crime, which will not only merit a heavy fine, but a peremptory *mandamus* will be granted, if the return be falsified. If they were all equal parties, this might be another case: The
[432] return was filed, and at the same time leave was given to file an information against the mayor.

10. DOMINUS REX *v.* THE MAYOR, &c. OF NORWICH.

[Hill. 11 Will. 3. B. R.]

S. C. post. 436. Holt 444.

Carth. 500, 501.

Vide 2 Bur. 798.

A *Mandamus* was granted to the mayor, *&c.* of *Norwich;* it was moved, that the sense of the mayor differed from the majority of the corporation, and that he would execute the writ, whereas the corporation were for returning an excuse, *&c.;* and they prayed, that the mayor might be ordered to deliver the writ to the rest of the corporation: *Sed non allocatur;* for he is the head and principal, and take your course against him (*a*).

(*a*) Which may be by way of information, *prout supra.*

S. C. ante 431. Post. 699.

11. DOMINUS REX *v.* THE MAYOR, &c. OF ABINGDON.

[Pasch. 12 Will. 3. B. R. 1 Ld. Raym. 559. S. C.]

Return, that A. was elected a burgess, but did not receive the sacrament within a year before, per quod the election was void, and he is not a burgess ill. Ante 428, 429. 4 Mod. 233. 3 Mod. 72, 118. 5 Mod. 432, 433, &c. 2 Show. 68, 475. 2 Saund. 289.

A *Mandamus* was directed *majori ballivis & omnibus principalibus burgensibus burgi de A.* (except *R.* and *S.*), setting forth the constitution, and that *R.* and *S.* were capital burgesses, chosen by the commonalty to stand and serve for mayor for the ensuing year; and that they were to choose one of them, *ideo* they were commanded to elect one of them accordingly. They returned the statute 13 *Car.* 2. *sess.* 2. *c.* 1., and that within twenty years, *prox. post* 25 *March* 1663. *R. & S. fuerunt electi burgenses principales*, and within a year before their election had not received the sacrament, *per quod electio eorum vacua devenit & non sunt principales burgenses;* and this return was held naught: 1st, The Court considered it without the last words, *et non, &c.* And as to that the Chief Justice said, the writ supposes them to be burgesses, and so the Court must intend them; and this is not answered by the special matter of the return, which shews only that he was once elected, and that was a void election; whereas he might qualify himself and be chosen again; and here is nothing to exclude the intendment of a subsequent election, which is according to the supposal of the writ.

2dly, The Court considered it with the last words, and held the *et non sunt principal. burgenses, &c.* to be only part of the conclusion or inference; and the Chief Justice said, the law requires the most exact certainty in these cases, because the party cannot traverse nor interplead (*a*); and it is not enough to offer a matter, so that the party may be able to falsify it in an action; but the matter must be so alleged, that the Court may be able to judge of it and determine, whether it be a sufficient cause, or not. If the matter set forth in this return had been so alleged in a plea in bar, the plaintiff might have replied a subsequent election: *Ergo* this return is uncertain, for there might have been a subsequent election.

Return must be certain to every intent. Vide ante 430. pl. 5, &c. ib. post. 436, 586, 589. Mod. Cases 89.

[433]

(*a*) By stat 9 *Ann.* ch. 20., the persons suing the *mandamus* may plead to or traverse all or any of the material facts contained in the return; to which the persons making the return may plead, take issue, or demur. In *Rex* v. *Lyme Regis, Doug* 148. Lord *Mansfield* says, he takes it to be settled that the same certainty is required now as before that statute; though at first it might have been otherwise determined, because the reason was not the same. *Buller*, J. said, that a certainty to a certain intent in general is all that is requisite; which means what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts which do not appear. *Vide Rex* v. Mayor of *Liverpool*, 2 *Bur.* 731. *Rex* v. Bailiffs of *Morpeth*, 1 *Str.* 58.

12. DOMINUS REX *v.* THE MAYOR, &c. OF RIPPON.

[Pas. 12 Will. 3. B. R. 1 Ld. Raym. 563. S. C.]

MANDAMUS was directed to the mayor, aldermen, and commonalty of *Rippon*, to restore Sir *Jonathan Jennings* to his place of alderman of *Rippon*; they returned themselves to be incorporated by another name, *viz.* mayor, burgesses, and commonalty; and farther, that Sir *Jonathan Jennings*, at such a time, at an assembly of the corporation, came *& personaliter libere & debito modo resignavit* his office, declaring he would continue to serve no longer in that office; whereupon they chose another in his room: And this declaration in a corporate assembly was held good, especially since the corporation accepted it, and chose another in his place; but till such election he had power to waive his resignation, not afterwards (*b*); and whether a deed was necessary, or not necessary, is not material, because they have positively returned *quod resignavit*, which is false, if a deed was necessary, and there was none. Also the Court held the writ naught, because it was directed to the corporation by a wrong name; but

Return of a resignation in the corporate assembly and election of another into the office, good. 1 Vent. 19. 1 Lev. 148. 2 Show. 66. 1 Sid. 14.

Carth. 501. Post. 700. Str. 55.

(*b*) *Vide Rex* v. Mayor, *&c.* of *Cambridge*, *Cowp.* 532.

refused to grant a new writ of *mandamus*, because an action lay against the particular persons for the false return of this: *Ergo* a new one would be vexatious.

13. THE CASE OF ANDOVER.

[Mich. 12 Will. 3. B. R.]

Several persons cannot join in a mandamus to restore. See 5 Mod. 10, 11. 1 Sid. 209. Post. 43, 67, 436. Comber. 307, 308. 6 Mod. 18.

FIVE persons cannot have *one* writ of *mandamus* to be restored; for though the end of the writ is to do justice, yet the foundation is the wrong in turning them out, and the turning out of one is not the turning out of another; nor can several persons join in action on the case for a false return. *Per Holt*, C. J.

1 Shower 258, 260, 281, 364. Far. 83. S. C. Holt 441. 1 Bl. Rep. 60. Str. 578.

14. DOMINA REGINA *v.* TWITTY AND MADDICOT.

[* 434]

[Mich. 1 Ann. B. R.]

Non fuit debito modo elect. not a good answer, unless the writ suggests, debito modo. S. C. Far. 83. Holt 442. 5 Mod. 10, 11. 12 Mod. 2. Carth. 170. Ld. Raym. 1379, 1405. 2 Bur. 1013. Str. 225. And. 105. Doug. 79. Com. Mandamus D. 5. 5 vol. 3d. edit. pa. 37.

MANDAMUS to swear *A.* and *B.* churchwardens, suggesting that they were *debito modo electi:* The return was, *quod A. & B. non electi fuerunt debito modo.* It was objected, that it ought not to be *debito modo;* and it ought to be in the disjunctive, *nec eorum alter elect. fuit. Sed per* Holt*, C. J. it was resolved, 1st, That one cannot be sworn upon this writ; for either both were chosen, or the writ is misconceived (*a*). 2dly, Where the writ is to swear one *debito modo electus, quod non fuit debito modo elect.*, is a good return, for it is an answer to the writ; but where it is to swear one *electus* churchwarden, there *quod non fuit debito modo elect.* is naught, because it is out of the writ, and evasive.

(*a*) *R. contr.* 2 *Ld. Raym.* 1008.

15. ANONYMOUS.

Q. 6 Mod. 25.

[Mich. 4 Ann. B. R.]

How many days between the teste and return. Ante 429. Pal. 455.

A Rule was made the first day of this term, *viz.* That if the corporation to which the *mandamus* is sent be above forty miles from *London*, then there shall be fifteen (*b*) days between the *teste* and the return of the first writ

(*b*) The rule here meant was produced in the case of *Rex* v. *Maj. et Jur. de Dover, Str.* 407. It appeared to be *fourteen*, and not *fifteen* days, as

of *mandamus;* but if but forty miles, or under, but eight days only: And as to the *alias* and *pluries*, they made no rule, but would consider of that, and that the writ should not be tested before it was granted by the Court; so that the *alias* and *pluries* may be made returnable *immediate*, as they used to be: Also the Court said; that at the return of the *pluries*, if no return was made, and there was an affidavit of the service, there should go an attachment without hearing counsel to excuse the contempt.

here stated. It had the words *ad minus:* Accordingly it was ruled in the said case in *Str.*, that *fourteen* days was the proper time; the one to be inclusive, and the other exclusive; so that a writ *tested* the 14th may be returnable the 28th.

16. DOMINA REGINA *v.* THE BAILIFFS, &c. OF IPSWICH.

[Serjeant Whitacre's *Case*, Hill. 4 Ann. B. R. 2 Ld. Raym. 1133. S. C.]

Variance between the writ and return in the name of the corporation. Vide post. 452, 658, and ante pl. 8. 1 Salk. 145, 146, 151. 1 Sid. 64. Hard. 97. 1 Lev. 50. S. C. Rep. A. Q. 67. Holt 443, 445. Mod. Cases 128.

A *MANDAMUS* was directed *ballivis, burgensibus, & communitat. villæ de Gippo*, to restore Serjeant *Whitacre* to the office of recordership; the return was, *responsio ballivorum, burgensium, & commun. villæ de Gipwico, sive burgi Gipwici patet, &c. nos ballivi, &c.*, return the constitution so and so; and that the recorder is amoveable *pro malgesturis per ballivos & burgenses vel major. partem eorum quorum ballivos duos esse volumus:* Then they shew Serjeant *Whitacre* chosen to continue *ad libitum*, and that at such a sessions of the peace the serjeant had notice, but did not attend; and that having notice to answer, he appeared and answered, and by the bailiffs, burgesses, and commonalty, (the bailiffs being then present,) he was turned out of his said office. *Et ulterius certificamus quod inhabitantes villæ prædict. nunquam nuncupati fuerunt per nomen ballivorum, burgens., & com. villæ de Gippo, &c.* This case depended long, and was often argued upon several objections; and, 1st, The Chief Justice held, that *Gippus* and *Gipwicus* were different names, so that the writ was misdirected; but then they should have returned the special matter accordingly, and relied upon it; for that now they had admitted themselves to be the corporation to whom the writ was directed, by returning *executio, &c.* And a corporation may have several names; and here it being started, Whether a corporation should lose its old name by a new charter? the Chief Justice said, It would, where the new charter altered the very constitution in the integral parts of it; as if bailiffs and burgesses are made mayor and alder- [435]

Hard. 504.

1 Sid. 461.
2 Cro. 540.
Raym. 188.
1 Lev. 148.
1 Vent. 82.

men, or mayor and burgesses, or where an abbot and convent are translated into a dean and chapter; but if the bailiffs and burgesses *villæ de Gippo* accept a charter, constituting them bailiffs and burgesses *villæ Gipwici*, and giving them farther privileges, and that they shall be so called; this is a new name only, for the old corporation remains in the integral parts of it. *Powell* being not satisfied in the first point, it vanished without resolution, by discovering that *Gippo* in the latter end of the return was with a dash, and in the writ without, so that then it was not *ad idem*. 2dly, The whole Court held, that though the bailiffs were only said to be present, they should be intended to be consenting, either actually, or as included in the major part. 3dly, That the recorder (*a*) is bound to attend and assist at the sessions to direct the corporation in the proceedings of justice, and that his office being a public office relating to justice, non-attendance is a good cause of forfeiture. 4thly, Though the summons or notice Serjeant *Whitacre* had to answer this charge set no time when he should appear, yet his appearing and answering cured the defect of notice in the time, and would have cured want of notice of the charge. *Palm.* 453. For though a man ought to be prepared, and have convenient time for that, yet he may waive this benefit if he will; but in this case, his notice was to answer his non-attendance at a sessions of *oyer* and *terminer*, and therewith he was charged; whereas he is turned out for non-attendance at a sessions of peace, and indeed answered to that, though not charged therewith; which the Court held incurable and fatal, and ordered a peremptory *mandamus*, and that it should be directed according to the first writ, *viz. Villæ de Gippo*, and must not differ; and though Mr. *Raymond* objected to a peremptory writ, because he was only recorder *ad libitum*, (1 *Sid.* 14.) *non allocatur;* for the corporation have not returned that; they have relied upon his misdemeanors, and not upon their power.

Non-attendance a good cause of forfeiture of the office of recorder. Bur. 1999. Defect of notice is cured by appearance. Ante 428. Str. 261.

A motion must be for the matter charged.

Ante 429.

(*a*) In the case of *the King* v. *the Corporation of Wells*, 4 *Bur.* 1999., it was held, that a general neglect or refusal to attend the duty of a recorder is a reason of forfeiture; a determined neglect, a wilful refusal. But it is otherwise with respect to a single instance of omitting to attend, when no particular business was expected, nor in fact happened.

17. DOMINA REGINA *v.* THE MAYOR AND ALDERMEN OF NORWICH.

['as. 5 Ann. B. R. 2 Ld. Raym. 1244. S. C.]

MANDAMUS to admit *Dunch* to be an alderman of *Norwich;* they returned the charter of *E.* 4. *Quod aldermani onerentur & exonerentur prout in London.;* and that in *London*, if a person be elected alderman by the ward, the Court of aldermen may refuse him; and that *D.* was elected by the ward, but refused by the mayor and aldermen, because he had not received the sacrament *infra annum tunc prox. antecedent. electionem suam;* and that he was turbulent and factious, and procured his election by bribery; *et quod non fuit electus.* The Court agreed that several causes might be returned, and that either, not qualified, or not elected, had been a good return; but the Chief Justice questioned whether bribery would vacate the election, because it did not appear to be an office concerning the administration of justice, and within the statute *E.* 6. Also the whole Court agreed, that as soon as *D.* was chose by the ward, it was an election, and that the aldermen did not choose, (having but one person sent them,) but approve; and that before approbation, the election was complete; as a presentation is before the bishop approves a clerk; or as a nomination is a perfect nomination before the other presents. It follows then, that this return is repugnant, and the Court cannot tell what to believe; for at first they admit an election, and avoid it; and yet at last they return, there was no election at all. A peremptory *mandamus* was granted (*a*).

Several matters may be returned, but they must be consistent. Vide post. 586, 589. 1 Show. 189. 3 Lev. 46. Lutw. 130. Mod. Cases 211. 3 Mod. 114. Ante 432. S. C. Holt 444.

Election in one body; approbation in another.

(*a*) Return that the person was not elected; and also that it was necessary for persons elected to be approved by the lord of the manor, which he was not, is good and consistent, *Wright* v. *Fawcett*, 4. *Bur.* 2041. So a return that the party was not duly elected, and that there was a custom to remove *ad libitum*, according to which he was removed; for he might be in possession de facto, and either ground would justify his removal, *Rex* v. *Churchwardens of Taunton, Cowp.* 413. Where two causes returned are inconsistent, the whole must be quashed; because the Court cannot know which to believe; and it is an objection to the whole return. But if, of causes not inconsistent, some are good and others are bad, the Court may quash the bad, and send the good to trial, *Rex* v. *the Mayor of Cambridge*, 2 *T. R.* 456. *Vide Rex* v. *the Mayor of York*, 5 *T. R.* 66.

18. DOMINA REGINA v. THE MAYOR, &c. OF DERBY.

[Mich. 6 Ann. B. R.]

Writ to one to command another to do the act, ill. Vide post. 489. pl. 51. 493. pl. 60.

MANDAMUS to the mayor, aldermen, and capital burgesses of *Derby*, *viz.* Whereas *A.* and *B.*, *&c.* removed the party complaining from his office of burgess, commanding them to command *A.* and *B.* to restore him, was quashed; for it is absurd that the writ should be directed to one person to command another.

Vide ante 433. pl. 13.

19. ANONYMOUS.

Several ought not to join in a writ to be restored. 2 Lev. 27, 288. 5 Mod. 11. See 1 Sid. 209. 5 Mod. 10, 11. Ante 433. pl. 13. 2 Saund. 116. 1 Vent. 167. 1 Lev. 109. Str. 578.

A *Mandamus* went to restore nine persons to the place and office of common council-men; the constitution was returned, and that these nine were *debite amoti.* *Holt*, C. J. The writ ought to be quashed; there ought not to be nine persons in one writ; the amotion of one is not the amotion of another; their interests are several, and they may have been removed for several different causes; one for one fault, and another for another. How can we grant a joint restitution to them? *Eyre* was of the same opinion.

[437] See 2 Lev. 364, 376, 411.

MARRIAGES.

1 Show. 50. S.C. 131.

1. ALLEYNE & UX. v. GREY.

[Mich. 1 W. & M. B. R.]

In debt by baron and feme; ne unques accouple is no plea. Doct. placit. 378. See 1 Lev. 41. 1 Sid. 13, 64, 387. 2 Rol. Abr. 551. pl. 1. 1 Keb. 41. Andrews 227.

IN *debt* on a bond, the defendant pleaded *ne unques accouple in loyal matrimony;* plaintiff demurred, and had judgment, for it alters the trial; instead of trying *per pais*, it puts the trial on a certificate from the ordinary; and, 2dly, It admits a marriage, but denies the legality of it; whereas a marriage *de facto* is sufficient, and, whether legal or not legal, is nowise material.

2. JESSON v. COLLINS.

6 Mod. 155. S.C. Holt 158.

[Pas. 2 Ann. B. R.]

Contract per verba de præsenti, or de futuro, equally cognizable in the Spiritual Court, and their sentence binding. Vide 3 Mod. 165. 5 Mod. 511. 2 Lev. 15, 16. 6 Mod. 155, 172. 5 Rep. 51. 3 Lev. 65. 1 Salk. 24, 25. 3 Lev. 65. Vi. Lutw. 68, 78, 79.

MR. *King* moved for a prohibition to stay a suit in the Spiritual Court, upon a contract of marriage *per verba de præsenti*, suggesting that the contract was in fact *per verba de futuro*, for which, if not performed, the party had remedy at common law. *Holt*, C. J. said, that though it were *per verba de futuro*, yet it was a matrimonial matter, and the Spiritual Court had jurisdiction; and this was the great objection against actions at law, when first brought up in these cases; but in answer to this it was held, that the remedy in the Spiritual Court was waived by betaking himself to damages for the breach: Also he said, that a contract *per verba de præsenti*, was a marriage, *viz. I marry You: You and I are man and wife;* and this is not releasable: *Per verba de futuro; I will marry you. I promise to marry you*, &c., which do not intimate an actual marriage, but refer it to a future act; and this is releasable; and as it is releasable, the party may admit the breach and demand satisfaction. He also said, he remembered this case upon evidence; *assumpsit*, in consideration that the plaintiff promised to marry the defendant, the defendant promised to marry him; upon evidence it was proved, that there was a promise; yet the defendant producing a sentence in the Spiritual Court, in disaffirmance of that contract, it was held good counter-evidence, and the plaintiff was nonsuit. A prohibition was denied.

[438]

See 2 Lev. 15, 16. acc. Str 961

3. WIGMORE'S *CASE*.

See 6 Mod. 155, 172.

[Mich. 5 Ann. B. R.]

Contract per verba de præsenti is a marriage. 3 Lev. 65, 411. 5 Mod. 411. Swinb. de Sponsalib. Cro. El. 79. Holt 459. S. C.

THE wife sued in the Spiritual Court for alimony. In fact, the husband was an Anabaptist, and had a licence from the bishop to marry, but married this woman according to the forms of their own religion. *Et per Holt*, C. J. By the Canon law, a contract *per verba de præsenti*, is a marriage: As, *I take you to be my wife*. So it is of a contract *per verba de futuro, I will take*, &c. If the contract be executed, and he does take her, it is a marriage, and they cannot punish for fornication. Upon a prohibition to the Spiritual Court of *Peterborough* (a).

(a) By stat. 26 *G.* 2. ch. 33. s. 1. marriages must be celebrated according to the rules of the Church of *England*. Sec. 13. No suit shall be had in the Spiritual Court to compel a marriage by reason of any contract, whether by *verba de præsenti*, or *verba in futuro*, entered into after the 25th *March* 1754. The act does not extend to marriages where both parties are Quakers or Jews, sec. 18.

MARSHAL AND MARSHALSEA.

See 6 Mod. 57, 225.

1. ANONYMOUS.

[Mich. 9 W. 3. B. R.]

Bond to the marshal to be a true prisoner, good.

PER Holt, C. J. It was adjudged in the case of Sir *Jo. Lenthall* versus *Cooke*, that the marshal might take a bond to be a true prisoner; but not to receive or take any thing of advantage or profit to himself, and that if he did, the bond was void at common law.

[439]

2. ANONYMOUS.

[Mich. 10 W. 3. B. R.]

Jurisdiction of the Palace Court.

A Prohibition was prayed to the †*Marshalsea*, because they refused to admit a plea, that neither of the parties were *de hospitio regis*. *Per Holt*, C. J. This is not the court mentioned in my Lord *Coke*'s case of the *Marshalsea*. If the cause of action arise within twelve miles of *London*, this Court holds plea, though the parties are not *de hospitio regis;* the plea is frivolous, and we will not interpose. But *Trin.* 11 *W.* 3. *B. R.* an action of debt was brought in the *Marshalsea*, on a judgment in *B. R.*, and a prohibition was granted.

†*Nota.* This must have been to the Palace Court, where neither plaintiff nor defendant must be of the king's household; but, in a suit in the Marshalsea, both must be of the king's household.

SNOW *v.* FIREBRASS.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 804. S. C.]

Earl marshal of England was formerly marshal of the King's Bench. 3 Salk 320. S. C.

A *Scire facias* was brought against the bail, and a breach assigned in this, that the defendant had not rendered himself *prisonæ mar. Maresc. domini regis*. Mr. *King* objected, that it was not good, without going on and saying, *coram ipso rege existentis*, for the king has another marshal, *viz.* the marshal of the household. *Et per Holt*, C. J., and *Powell*, The earl marshal of *England* was by his office marshal of the *King's Bench*, as appears by the book of *H.* 6., and so continued till the time of King *James* the first, when

this office was derived out of it; so that the marshal of the king is the marshal of the *King's Bench;* no body else can be understood; the other is *mareschallus hospitii*, and never spoken of without that addition.

The office of chamberlain of the King's Bench prison is inseparably incident to the office of marshal; and therefore a grant of the office of marshal, with a reservation of the office of chamberlain, is void. *Per Holt*, C. J. *Mich.* 3 *Ann. B. R.*

[440]

See Vaug. 242, 243. 2 Lev. 27, 172. 3 Lev. 351, 352. S. C. 1 D. 7. p. 3, 8. p. 6. 3 Mod. 321. 1 Show. 29, 101. Comb. 116. 2 Lev. 256. 2 Show. 478. Carth. 58. 3 Salk. 203. Skin. 278. Holt 648.

MASTER AND SERVANT.

1. BOSON *v.* SANDFORD & AL.

[Mich. 1 W. & M. B. R. Intr. Hill. 1 & 2 Jac. 2. Rot. 302.]

Goods are spoiled by the default of the master of a ship, employed by owners; the owners are liable in respect of the freight. See 3 Lev. 37, 258. 5 Mod. 91, 340. 2 Saund. 260. Post. 443. Action lies against the owners; 2 Saund. 115.; for he who employs a servant, undertakes for him. Vide prox. casum, 3 Mod. 323. Moll. 208, 209. But the action must be brought against all the part-owners. 1 Salk. 10, 31. 1 Bulst. 16. 4 Mod. 17. 3 Mod. 244. 1 Mod. 18. 1 Ld. Raym. 739. Rep. B. R. Temp. Hard. 85, 194.

CASE against *A.* and *B.*, part-owners of a ship, for that he put goods on board, and the defendants undertook to carry them safely for hire, but yet were so negligent that the goods were spoiled. Upon not guilty pleaded, in evidence it appeared, that *C.* and *D.* were also part-owners, and that the ship was under the care of a master, to whom the goods were delivered; and this being found specially, it was argued *pro quer.*, that the action is grounded on the wrong, and may be against all or any of the proprietors. There was also another started, and that was, Whether the owners were liable, when in truth they did not undertake; but in fact the master *super se suscepit? Eyre*, J[illegible]ce, held there was no difference between a land-carrier and a water-carrier, and that the master of a ship was no more than a servant to the owners in the eye of the law; and that the power he has of hypothecation, *&c.* is by the civil law. *Et* [illegible]*r Holt*, C. J. The owners are liable in respect of the freight, as employing the master: for whoever employs another is answerable for him, and undertakes for his care to all that make use of him. 2dly, The Court held, that the owners were liable, for they are considered, in point of contract, as employers, and are all equally entitled to the freight. Either master or owners may bring an action for the freight; but, if the owners bring the action, they must all join; *ergo* they must all be joined; as the freight belongs to all, so all are equally undertaking; and a breach

of trust in one is a breach of trust in all; as where two make one officer, the act of one is the act of the other. 3dly, The Court held this was not an action *ex delicto*, but *ex quasi contractu*, and it was not the contract of one but of all: That there was no other tort but the breach of trust. Therefore the Court gave judgment for the defendant, because all the owners were not joined (*a*).

(*a*) But a defendant must now plead in *abatement*, that there are others who ought to be, and are not, joined with him; and he will not be allowed to give it in evidence, and nonsuit the plaintiff, *Rice* v. *Shute*, 5 *Bur.* 2613. 2 *Bl. Rep.* 696. The same was also decided in *Abbott* v. *Smith*, 2 *Bl. Rep.* 947., where this case is commented upon and denied.

[441]

Pawns. Vide Post. 522.

2. JONES v. HART.

[Mich. 10 W. 3. *Coram* Holt, *C. J.* *At* nisi prius *at* Guildhall. 1 Ld. Raym. 738. S. C.]

Master liable for the neglect of his servant, not the wilful wrong. See prox. pag. ante 282. 2 Cro. 202. Palm. 534. 4 Leon. 123. 2 Saund. 345. 1 Mod. 198. Hob. 206. 3 Mod. 323. Hutt. 121. 3 Lev. 258. 1 Show. 29. Post. 613, 614. 5 Mod. 9, 340. 2 Saund. 260. Holt 642. S. C. 2 Lev. 172. Ante 18. 2 Str. 1004.

A pawn-broker's servant took a pawn; the pawner came and tendered the money to the servant; he said he had lost the goods: Upon this the pawner brought trover against the master, and it was held well, *per Holt*, C. J.

The servants of *A.* with his cart run against another cart, wherein was a pipe of sack, and overturned the cart, and spoiled the sack; an action lies against *A.* So where a carter's servant run his cart over a boy, it was held the boy should have his action against the master for the damage he sustained by this negligence. So in *Lane* and *Cotton* (*b*). a letter with bills in it was delivered at the post-office to a servant; it was held, case lay against the post-master and not against the servant, unless he stole them, for then he was a wrong-doer, as where a gaoler suffers an escape wilfully; otherwise, if negligently. *Per Holt*, C. J.

(*b*) The contrary was ruled to what is here stated. *Vide* the case, pa. 17.

3. DOMINA REGINA v. GOUCHE.

[Mich. 1 Annæ, B. R. 2 Ld. Raym. 820. S. C.]

Order to pay 42s., being due for work and labour in husbandry, though it do not appear such wages as the statute directs. Remedies

AN order was made by the justices on *Gouche*, reciting, That whereas 42 *s.* and 4 *d.* was due from him to *J. S.* for work and labour in husbandry, they order him to pay the same: The exception was, that it does not appear to be statute-wages, and such only are within their jurisdiction. *Per Powell* and *Gould.* Though the statute gives them a power only to set the rate for wages, and not to

order payment; yet, grafting hereupon, they have also taken upon them to order payment; and the courts of law are indulgent in remedies for wages, as appears by its suffering the Admiralty to have cognizance of mariners' wages; and therefore they would intend it such wages as were within the statute: And *Gould*, J. cited a case, *The King* against *Dummer*, an order to pay for days-works and labour done, which was held well; for the Court will intend it within their jurisdiction upon general words, unless the contrary appear upon the face of the order, as in the case, 2 *Jones* 47. for a coachman's wages. Affirmed, *Holt absente*.

for wages are favoured in the superior courts. 5 Mod. 419. Post pl. 5, 485. pl. 40.

Vi. Carth. 156. Str. 8. Fortesc. 318. Stat. 20 G. 2. c. 9.

4. WARD v. EVANS. [442]

[Hill. 2 Ann. B. R. 2 Ld. Raym. 928. S. C. Comyns 138. S. C.]

WARD sent his servant to receive a note of 50*l.* of *B.*, who went with him to Sir *Stephen Evans*'s shop, who indorsed off 50*l.* from a note *B.* had upon him, and gave *Ward*'s servant a note of 50*l.* upon one *Wallis* a goldsmith, to whom the note was carried the next day by *Ward*'s servant: *Wallis* refused to pay, and that day broke; upon this the note was sent back to Sir *Stephen Evans*, who refused payment, whereupon the action was brought. *Et per Cur.* it was held, 1st, That this was money received by Sir *Stephen Evans*. 2dly, That the act of a servant shall not bind the master, unless he acts by authority of his master; and therefore if a master sends his servant to receive money, and the servant, instead of money, takes a bill, and the master, as soon as told thereof, disagrees, he is not bound by this payment; but acquiescence, or any small matter, will be proof of the master's consent, and that will make the act of the servant the act of the master.

Act of a servant binds not his master, unless he acts by authority of his master, or he consents. See 2 Lev. 172. 3 Lev. 252. Comber. 451. 1 Salk. 132, 133. Winch. 24, 25. 5 Mod. 398, 399. 6 Mod. 36. S. C. 3 Salk. 118. Cases B. R. 521. Holt 120. 1 Bulst. 103. R. acc. 10 Mod. 109. Vide 1 Bl. Com. 430. 1 Str. 506. Esp. 115. 3 Bac. Ab. 560. Fenn. v. Harrison, 3 T. R. 757. 4 T. R. 177.

3dly, They held this was no payment; for a goldsmith's note is only paper, and received conditionally, if paid; and not otherwise, without an express agreement to be taken as cash.

Goldsmith's notes are payment conditionally only, without express consent. See 6 Mod. 36. Post 507, 508. 3 Mod. 86. 3 Lev. 299. Moll. li. 2. c. 10. Hob. 154.

4thly, They held, that the party receiving such note should have a reasonable time to receive the money, as in this case, the next day, and is not obliged, as soon as he receives it, to go straight for his money (*a*).

(*a*) *Vide Str.* 415, 416, 508, 533, 1175, 1248. *Bailey* 33, 73. 1 *T. R.* 171. *Beawes* 461. *Kyd* 29, 80.

5. DOMINA REGINA *v.* LONDON.

[Trin. 3 Ann. B. R.]

In order for payment of servants' wages, if it do not appear in what service, the court will intend it husbandry. Vide Post. 484. pl. 40. 5 Mod. 419. Ante pl 3, 441. 3 Salk. 261. S. C. 6 Mod. 204. Set. and Rem. 231. 3 T. R. 496.

ORDER was for payment of wages, reciting, That two persons were retained by *London*, overseer of the works in the gardens of *Hampton-Court*, at so much *per diem*, and had worked there so many days; therefore the order was, that *London* should pay them. *Et per Cur.* The statute extends only to servants in husbandry, not to gentlemen's servants, nor to journeymen with their masters. Had the order been general, *viz.* to pay so much to two of his labourers, *&c.*, or two of his servants, the Court should have supposed them servants in husbandry; but here is no room for such an intendment, since the contrary appears.

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[443] Vide 2 Lev. 69, 188, 228. 3 Lev. 87, 258, 351 S. C. 3 Lev. 320. 4 Mod. 58. 1 Show. 320. S. C. Carth. 216. Holt 465.

MERCHANTS AND MERCHANDIZE.

1. JEFFRIES *v.* LEGANDRA.

[Hill. 2 W. & M. B. R. Rot. 659.]

In policies warranted to depart with convoy, shall be intended without wilful default of the master. Vide ante 440. 6 Mod. 13. 4 Mod. 176. 1 Salk. 31. Molloy, lib. 2. c. 7. s. 12. 2 Keb. 717, 722.

ACTION on a policy of insurance; the defendant pleaded *non assumpsit*, and the jury found the policy, by which the insurers undertook against perils of sea, pirates, enemies, *&c.*, from *London* to *Venice*, *warranted to depart with convoy*. *Et per Cur.* The words *warranted to depart with convoy* mean only, that he will leave the port, and sail with the convoy, without any wilful default in the master; therefore if, by default of the master, the ship is separated and taken, the insurers are not liable; but if there be no default, the master having done all that could be done, and the ship is separated and taken by enemies, the insurers are liable; so if the ship be lost by stress of weather, for they insure against these by their own agreement (*a*).

(*a*) In the report of this case in 3 *Lev.* it is said, that the words to *depart with convoy* extend to sail with convoy for the whole voyage; and the same was ruled accordingly in *Lilly v. Ewer, Doug.* 74.; though this case of accidental separation was allowed to be no breach of the warranty. *Vide* also 2 *Str.* 1250. *Park.* 397.

2. LETHULIER'S *CASE*.

[Mich. 4 W. & M. B. R.]

ACTION on a policy of insurance by the defendant at *London*, insuring a ship from thence to the *East Indies*, *warranted to depart with convoy;* and shews, that the ship went from *London* to the *Downs*, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration; to which it was objected, that here was a departure without convoy. *Et per Cur.* The clause, *warranted to depart with convoy*, must be construed according to the usage among merchants, *i. e.* from such place where convoys are to be had, as the *Downs*, *&c.* (*a*) *Holt*, C. J. *contra:* We take notice of the laws of merchants that are general, not of those that are particular usages. It is no part of the law of merchants to take convoy in the *Downs*. *Vide Yelv.* 136.

Warranted to depart with convoy, shall intend from the place of having convoy. 3 Lev. 320, 321. Molloy, l. 2. c. 7. s. 12. 4 Mod. 58. 2 Keb. 717, 722. 1 Show. 320. 2 Saund. 205. 2 Stra. 1265.

(*a*) *R. acc. Str.* 1265. Mr. *Park*, in his Treatise on Insurances, 344, observes that this doctrine has been recognized in several other cases, in which the question has come collaterally before the Court, and that indeed of late years it has been tacitly acquiesced in; for there never is a convoy from the port of *London*.

3. MARTIN *v.* CRUMP. [444]

[Pas. 10 Will. 3. B. R. 1 Ld. Raym. 340. S. C.]

TWO joint merchants make *B.* their factor; one dies, leaving an executor; this executor and the survivor cannot join, for the remedy survives, but not the duty; and therefore on recovery he must be accountable to the executor for that.

Survivorship. Vide 1 Show. 188, 189, &c. 2 Lev. 188. Comber. 474. S. C. 2 Saund. 116. [illegible] 410. 1 Rol. Rep. 421. Com. Merchant L.

4. GREEN *v.* YOUNG.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 840. S. C.]

IF after a policy of insurance a damage happens, and afterwards, in the same voyage, a deviation; yet the assured shall recover for what happened before the deviation; for the policy is discharged from the time of the deviation only.

Vide Shower 189. *Kemp* and *Andrews:* The remedy survives between two joint merchants, but not the interest.

Deviation discharges policy from that time only. Vide acc. Str. 1249. Doug. 16, 346. Park. 349. et seq.

5. ANONYMOUS.

[Hill. 1 Ann. B. R.]

Detention.

A SHIP insured was in her voyage seized by the government, and turned into a fireship: The question was, Whether the insurers were liable? *Holt*, C. J. thought it was within the word *detention;* but the cause was referred (*a*).

(*a*) This is a part of the preceding case, *vide* 2 Ld. *Raym.* 840. The point, Whether insurers are liable for damages from detention of ships by the government to which they belong? does not appear to have been judicially decided; but Mr. *Park* observes (pa. 91), that the very general words made use of in policies go to support the idea entertained by Lord *Holt*; and though he has found no case where this point is *expressly settled*, yet it seems to have been *taken as* settled in many cases which have come before the Court; that in the case of *Robertson* v. *Ewer*, 1 *T. R.* 61., no question was made whether the insurers were liable for loss sustained by such a detention, provided it had happened to property specially insured.

6. BATES *v.* GRABHAM & AL.

[Decemb. 3, 1703. *Coram* Holt, C. J. *At* nisi prius *at* Guildhall.]

Policy altered by consent after it was written, will S. C. Holt 469.

IN *case* on a policy of insurance, upon *non assumpsit* pleaded, the case was, Mr. *Crisp* being at the *West Indies*, sent a letter to *Bates* to insure goods on the *Mary-Galley* of *St. Christopher's*, Captain *A. Hill* commander, at *London*. *Bates* carried the letter to *Stubbs*, who writ policies, and he by mistake made the assurance on the *Mary*, Captain *Haslewood*, commander, &c. This policy thus made was subscribed by the defendant. The *Mary-Galley* was lost, and then *Stubbs* applied to the insurers to consent to alter the policy, to which they agreed, and the mistake was mended. It was objected at the trial, that the *Mary* was a stouter ship than the *Mary-Galley*, and that the insurers ought to have an increase of *premium* for the alteration. But it was held by *Holt*, C. J. that the action well lay, and that the mistake might be set right, and that *Stubbs* was a good witness; and he cited this case, which happened when *Pemberton* was Chief Justice: An insurance was made from *Archangel* to the *Downs*, and from the *Downs* to *Leghorn;* but there was a parol agreement at the same time, that the policy should not commence till the ship came to such a place; and it was held the parol agreement should avoid the writing.

Park. 3, 4. Motteaux v. London Assurance Comp. 1 Atk. 545.

[445]

7. BOND v. GONSALES.

[February 14, 1704. *Coram* Holt, *C. J. At* nisi prius *at* Guildhall.]

CASE upon a policy, which was to insure the *William-Galley* in a voyage from *Bremen* to the port of *London*, *warranted to depart with convoy*. The case was, the galley set sail from *Bremen*, under convoy of a *Dutch* man of war to the *Elb*, where they were joined with two other *Dutch* men of war, and several *Dutch* and *English* merchant ships; whence they sailed to the *Texel*, where they found a squadron of *English* men of war and an admiral. After a stay of nine weeks they set out from the *Texel*, and the galley was separated in a storm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80*l.* salvage. And it was ruled *per Holt*, C. J. that the voyage ought to be according to usage, and that their going to the *Elb*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ships directly from *Bremen* to *London*: And the plaintiff had a verdict.

Deviation or not, must be construed according to usage. S. C. Holt 469. 2 Stra. 1265. 1 Bur. 348. Comp. 601. 2 Str. 1265. Park. 308.

8. THE MAYOR AND COMMONALTY OF LONDON v. WILKS.

[Trin. 3 Annæ, B. R.]

A MERCHANT includes all sorts of traders as well and as properly as merchant adventurers. *Vide Spelm. Guilda*, *Dy.* 279. *b.* A merchant-tailor is a common term. *Per Holt*, C. J. (*a*).

Merchant, quid?

(*a*) Ld. Ch. Baron *Comyns*, referring to this case, says, "Generally every one shall be a merchant who trafficks by way of buying and selling or bartering of goods or any merchandize within the realm, or in foreign parts, *Dig. Merchant, A.* There are four species of merchants—merchant adventurers, merchants dormant, travellers, and merchants resident, 2 *Brownl.* 99.

See 1 Salk. 25. 2 Keb. 463. Latch. 84. Yelv. 80, &c. infra.

MONEY.

DIXON v. WILLOUGHS.

[Mich. 8 Will. 3. B. R.]

Indebitatus assumpsit in 13 l. 10 s. for nine guineas, well. Latch. 84. Yelv. 80, 135. Poph. 28. Cro. Car. 515. Palm. 407. 5 Mod. 6, 7. Lutw. 487, 488. 1 Salk. 9, 22, 25. S. C. Ante 311. 3 Salk. 239. Holt 471. Cases B. R. 100. Comb. 327, 387. S. C. Vide Co. Lit. 107. a. but note 1. to Co. Lit. 107. b.

IN *case* upon four several promises, there was a verdict for the plaintiff, and entire damages. It was moved in arrest of judgment, that one of the promises was ill laid, *viz.* That whereas the defendant was indebted to him in 13*l.* 10*s.* for nine guineas, he promised to pay, *&c.*, and says not, nine guineas *ad valorem, &c.*, as he ought, and value being not ascertained by proclamation. *Et per Holt,* C. J.:

1st, Any piece of money coined at the Mint is of value as it bears a proportion to other current money, and that without proclamation. The unit was the old piece, which was 20*s.* In King *James* the First's time the unit was by proclamation raised 16*d.*, which was the reason and occasion of the coin of guineas, and of their being 16*d.* short of the unit.

2dly, There are guineas of 40*s.* a-piece, and so we will intend these were, and that the plaintiff was satisfied the rest.

3dly, That it was not necessary to set forth the number of the guineas; for in an *indebitatus assumpsit* the consideration is only set forth to shew it was not a debt by bond, *&c.*

[447]

Vide 3 Mod. 131. 1 Mod. 18. Vaugh. 345, 346. 3 Lev. 351, 352. 2 Jon. 53, 54, 353, &c. 2 Brownl. 296. F. N. B. 222. S. C. Comb. 84. 1 Rol. Rep. 4. 3 Inst. 181. 2 Inst. 540. Holt 475.

MONOPOLY.

EDGEBERRY *and* STEPHENS.

A GRANT of a monopoly may be to the first inventor by the 21 *Jac.* 1.; and, if the invention be new in *England*, a patent may be granted, though the thing was practised beyond sea before; for the statute speaks of new manufactures within this realm; so that if they be new here, it is within the statute; for the act intended to encourage new devices useful to the kingdom, and whether learned by travel or by study, it is the same thing. Agreed by *Holt* and *Pollexfen*, in the case of *Edgeberry* and *Stephens.*

1 Hawk. ch. 79. s. 14.

MONSTRANS DE DROIT, &c.

Vide 5 Mod. 57, 58. Ryley Plac. Parl. 257, 351. Staundf. P. C. 72.

DOMINA REGINA v. MASON.

[Trin. 1 Ann. B. R.]

IT was found by inquisition, that *Ford* had forfeited his office of warden of the *Fleet*, upon which it was seized into the queen's hands. One *Mason* brought a *monstrans de droit* in Chancery on the inquisition, and sets forth a title, and traverses *Ford's* being seized of the office, so that by consequence he could not forfeit it; the attorney-general demurred. The cause was brought into *B. R. per proprias manus* of the Lord Chancellor; and now it appeared that *Mason's* title, as set forth, was naught; whereupon *Mason*, as *amicus Curiæ*, insisted still that *Ford* had not forfeited, and so the queen had no title; and therefore it was urged, that no judgment could be given for the queen, and that the whole record was here, and the record being here, the whole record was to be affirmed or subverted by the judgment of this Court. *Et per Cur.* The very record of the inquisition itself is not before us, but only the record of the *monstrans de droit:* For, as to the inquisition, the *monstrans de droit* recites it, and concludes *prout patet per record. inquisitionis in filaciis Curiæ Cancellariæ;* and the *monstrans de droit* may set forth the inquisition, with an *inter alia*, and *oyer* may be craved of it. 2dly, The Court held, that though the very record of the inquisition was not so before the Court, as that they could quash or subvert it, with respect to all persons or parties; so as no other person could at any time after come into Chancery and shew his right, for that would be inconvenient; yet it was here with respect to the party plaintiff in this *monstrans de droit*, so that if thereby a title appeared for him, the Court might give judgment; and if the inquisition be falsified, it shall be set aside, so far as to make way for the party's right; and if the party's right can be collected from the inquisition, it shall be affirmed by the judgment; so was *Holland's* case, and so is *Kel.* 93. 3dly, They held, that if it appears that he that sued the *monstrans de droit* has no right, he cannot mend his case by exceptions to the inquisition taken as *amicus Curiæ*, though by those exceptions it appears the queen has no right, or that a stranger has right: for the party that sues a *monstrans de*

If the plaintiff fails in his title, he cannot take advantage of want of title in the crown, or of a stranger's title. S. C. Far. 32.

[448]

Vide Fares. 32.

The record of the inquisition is only before the Court, with respect to the plaintiff; but not in respect to other persons and parties.

Vide 1 Salk. 395. 5 Mod. 57.

droit is a plaintiff, and may be nonsuit. 4 *H.* 6. 12. And, if he fails in his own title, he is gone as effectually as if he were nonsuit, and no judgment needs to be given for the queen; accordingly judgment was given here, *quod nil capiat per billam suam de monstratione sua præd.*

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[449]

Vide 1 Chan. Cas. 2, 22, 59, 102, 166, 285. 2 Chan. Cas. 23, 29, 52, 97, 221, 206.

MORTGAGES.

1. LORD OSSULSTON *contra* LORD YARMOUTH.

[Decem. 1707. In Canc.]

Proviso, That future interest, if not paid, shall be taken as principal, and bear interest, is void. 1 Chan. Cas. 229, 52, 258. 2 Chan. Cas. 35, 59. Vide 2 Atk. 330. Treatise of Equity 119.

THE Earl of *Yarmouth* made a mortgage to my Lord *Ossulston*, with a *proviso*, that if the interest was behind six months, that then that interest should be accounted principal, and carry interest. *Et per Cowper*, Lord Chancellor, this clause was decreed to be vain, and of no use, saying, No precedent had ever carried the advance of interest so far, and that an agreement made at the time of the mortgage will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal.

2. TAYLOR *contra* WHEELER.

[Mich. 8 Ann. In Canc.]

Mortgagee or purchaser precedent, though by defective conveyance, shall be preferred before assignees of commissioners of bankrupt. See 1 Chan. Cases 119, 150, 166, 167, 201, &c. S. C. Eq. Ab.

A COPYHOLDER in fee surrendered to the use of the mortgagee in fee, and became bankrupt before presentment, and there never was any presentment made; and the question was, Whether the assignee of the commissioners of bankruptcy, or the mortgagee, should be preferred? *Et per Cowper*, Lord Chancellor, Though the surrender was void in law for want of a presentment, and that might be the laches of the mortgagee in not procuring it; yet the surrender has a lien, and bound the land in equity (*a*), and the assignee ought not to be in a better

(*a*) As to the relation of the admittance to the surrender at law in *Roe* v. *Griffith*, 4 *Bur.* 1959. *Benson* v. *Scott*, *ante* 185, and the authorities therein referred to.

case than the bankrupt, who was plainly bound in equity by this defective conveyance. *Et come moy semble*, he became a trustee for the purchaser [*mortgagee*] (*a*). 122. p. 3. 312. p. 8. 2 Vern. 564. Vern. 267.

(*a*) The creditors and assignees of a bankrupt stand in his place, and are subject to the same equity, and bound by all acts fairly done by him; for, although the Court will favour creditors as much as they can, it must be where they have a superior right to other persons, *Co. Bank. L.* 325. *Vide Tyrrell* v. *Hope*, 2 *Atk.* 558. *Pye* v. *Danbuz*, 3 *Bro.* 595. *Finch* v. Lord *Winchelsea*, 1 *P. Wms.* 277. *Jacobson* v. *Williams*, *id.* 382. *Bosvil* v. *Brander*, *id.* 458. *Bushman* v. *Pell*. *Cox's* note, *ibid.* *Russel* v. *Russell*, 1 *Bro.* 269.

3. COPE *contra* COPE.

[In Canc.]

Where personal estate shall be applied to pay off mortgage in exoneration of land. S. C. Eq. Ab. 269. p. 2. Hardr. 512.

IF a man mortgage lands, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage: So it is, though there was no covenant, if the mortgagor had the money; *because it was his debt, and he is bound to make it good though the land be a defective security; but if grandfather mortgages and covenants to pay, and the lands descend to his son, and his son dies, having a personal estate and a son, the son's personal estate shall not go in aid of this mortgage. *A.* mortgages his land to *B.*, and after sells it to *C.* for 1000*l.*, which includes the mortgage money; *C.* the purchaser shall pay the mortgage, for he has made it a debt in himself: But it is to be understood that this exoneration is not to be allowed, unless there be personal assets sufficient to pay all legacies; for the mortgage shall be paid out of the land if there be not personal assets to pay the legacies; and if by such payment assets fall short, the legatees may make such mortgagee refund (*b*).

[* 450]

1 Chan. Cas. 81, 223, 271, 285, 286. 1 Chan. Rep. 98, 148, 183, 191. 2 Chan. Cas. 98, 165, 187, 221. 2 Chan. Rep. 274, 396. 3 Chan. Rep. 212, 213. Vern. 36, 37.

(*b*) The doctrine upon this subject is collected in the following note, by Mr. *Cox*, to the case of *Howell* v. *Price*, 1 *P. Wms.* 290. "The personal estate of a testator shall in all cases be primarily applied to the discharge of his personal debt (or general legacy), unless he, by express words, or manifest intention, exempt it, 2 *Atk.* 625. 3 *Atk.* 202. *Haslewood* v. *Pope*, 3 *P. Wms.* 324. *French* v. *Chichester*, 1 *Bro. P.C.* 192. *Fereyes* v. *Robertson*, *Bunb.* 302. *Walker* v. *Jackson*, 2 *Atk.* 624. *Bridgeman* v. *Dove*, 3 *Atk.* 202. Earl of *Inchiquin* v. *French*, *Ambler* 33., and 1 *Wils.* 82. *Samwell* v. *Wake*, 1 *Bro. Chan. Rep.* 144. Duke of *Ancaster* v. *Mayer*, 1 *Bro. Chan. Rep.* 454. Yet it may be exempted, as in *Bampfield* v. *Wyndham*, *Prec. Chan.* 101. *Wainwright* v. *Bendlowes*, 2 *Vern.* 718., and *Ambler* 581. *Stapleton* v. *Colville*, *Cas. Temp. Talb.* 202. *Walker* v. *Jackson*, 2 *Atk.* 624. *Anderton* v. *Cooke*, and *Kynaston* v. *Kynaston*, (cited) 1 *Bro. Ch. Rep.* 456. *Holiday* v. *Bowman*, cited 1 *Bro. Ch. Rep.* 145. *Webb* v. *Jones*, 2 *Bro. Ch. Rep.* 60. Every loan creates a debt from the borrower, whether there be a bond or covenant for

payment or not, *Cope* v. *Cope, supra. Howell* v. *Price,* 1 *P. Wms. ubi supra. Balsh* v. *Hyam,* 2 *P. Wms.* 455. *King* v. *King,* 3 *P. Wms.* 358. So it shall be, although such personal debt be also secured by mortgage, as in the said cases of *Howell* and *Price, Cope* v. *Cope,* and in *Pockley* v. *Pockley,* 1 *Vern.* 36. *King* v. *King,* 3 *P. Wms.* 360. *Gatton* v. *Hancock,* 2 *Atk* 436. *Robinson* v. *Gee,* 1 *Vez.* 251. Earl of *Belvidere* v. *Rochfort,* 6 *Bro. P. C.* 520. *Philips* v. *Philips,* 2 *Bro. Ch. Rep.* 273. So lands subject to or devised for payment of debts, shall be liable to discharge such mortgaged lands either descended or devised, *Bartholomew* v. *May,* 1 *Atk.* 487. Marchioness of *Tweedale* v. Earl of *Coventry,* 1 *Bro. Ch. Rep.* 240.; even though the mortgaged lands be devised expressly subject to the incumbrance, *Serle* v. *St. Eloy,* 2 *P. Wms.* 386. So lands descended shall exonerate mortgaged lands devised, *Galton* v. *Hancock,* 2 *Atk.* 424. So unincumbered lands and mortgaged lands, both being specifically devised (but expressly after payment of all debts) shall contribute in discharge of such mortgage, *Carter* v. *Barnardiston,* 1 *P. Wms.* 505. and 2 *Bro. P. C.* 1. But in all these cases, the debt being considered as the personal debt of the testator himself, the charge on the real estate is merely collateral The rule, therefore, is otherwise where the charge is on the real estate principally, although there be a collateral personal security; Countess of *Coventry* v. Earl of *Coventry,* 2 *P. Wms.* 222. *Edwards* v. *Freeman,* 2 *P. Wms.* 437. *Wilson* v. Earl of *Darlington,* 2 *P. Wms.* 664. note; *Ward* v. *Ld. Dudley,* 2 *Bro. Ch. Rep.* 316.; or where the debt (although personal in its creation), was contracted originally by another, *Cope* v. *Cope, supra Bagot* v. *Oughton,* 1 *P. Wms.* 347. *Leman* v. *Newenham,* 1 *Vez.* 51. *Robinson* v. *Gee,* 1 *Vez.* 251. *Parsons* v. *Freeman, Ambler* 11. *Lacam* v. *Mertins,* 1 *Vez.* 312. *Perkyns* v. *Bayntun,* 2 *P. Wms.* 664. note; *Lawson* v. *Hudson,* 1 *Bro. Ch. Rep.* 58. *Shafto* v. *Shafto,* 2 *P. Wms.* 664. note; *Basset* v. *Percival, ibid.* Earl of *Tankerville* v. *Fawcett,* 2 *Bro. Chan. Rep* 57. *Tweddell* v. *Tweddell,* 2 *Bro. Chan. Rep.* 101, 152. *Billinghurst* v. *Walker,* 2 *Bro. Ch. Rep.* 604. With respect to the priority of application of real assets (when the personal is either exempt or exhausted), it seems, 1st, That the real estate, expressly devised for payment of debts, shall be applied. 2dly, (To the extent of the specialty debts,) the real estate descended. 3dly, The real estate specifically devised, subject to a general charge of debts. *Galton* v. *Hancock,* 2 *Atk.* 424. *Powis* v. *Corbett,* 3 *Atk.* 566. *Wride* v. *Clarke,* 2 *Bro. Ch. Rep.* 261, note. *Davies* v. *Top,* 2 *Bro. Ch. Rep.* 259, note. *Denne* v. *Lewis,* 2 *Bro. Ch. Rep.* 257. As to marshalling assets, *vide* note to *Clifton* v *Burt,* 1 *P. Wms.* 678. inserted 2 *Salk.* 416. *Vide* also *Cox's* note to 2 *P. Wms.* 664.

Vide Records 665. Rules, &c. 597 pag 598. pl. 3 & 647. pl. 14. Vide post. 671.

MOTION.

1. HINTON *v.* HERN.

[Hill. 9 Will. 3. B. R.]

Franchise cannot be allowed on motion, unless it has been ...

IN a motion for prohibition to the university of *Cambridge*, the other side, insisted on their privileges, which are confirmed by parliament. *Et per Cur.* You must

plead them. The difference is, where franchises have been once allowed on plea, and are upon record in court, there they may be allowed upon motion ever after; but, where they have not been allowed, it is otherwise; and so it was held and done between *Castle* and *Litchfield*, where the franchise of *Oxford* was pleaded; and so they were obliged to do here.

merly pleaded and allowed, and is upon record. Vide 1 Salk. 343. & post. 500. S. C Cases B. R. 165. 2 Wilson 406, &c.

2. DOMINA REGINA *v.* LAYTON.

[Pasch. 4 Ann. B. R.]

UPON a conviction of forcible entry, if a fine be set, the conviction cannot be quashed upon motion, but the defendant must bring his writ of error; otherwise if no fine be set, for then it may be quashed upon motion: *Per Cur.*

Where fine is set for forcible entry, conviction not quashed on motion. Ante 106, 353. 1 Str. 474. 2 Str. 794.

[451]

NAMES OF PURCHASE AND DIGNITY.

Hob. 129. 1 Vent. 152. Lit. R. 181, 201. Yelv. 34. 1 Sid. 40. 1 Lev. 50. 1 Show. 392. 5 Mod. 303. Ow. 81. Pop. 209. Noy 88. 4 Co. 118. 6. Co. 53. 1 Salk. 6, 50. 1 Ld. Raym. 303, 304, 562.

AN *indictment* was preferred against two chairmen for a battery upon *Thomas* Lord Marquis of *Carmarthen*, who was called up to the House of Lords by the name of Lord *Osborn;* and it was held by the Chief Justice, that there was no such person, or at least the Duke of *Leeds* was the person, and not the prosecutor. At the *Old Baily*, one was indicted for stealing the goods of the Earl of *Kingston*, who was the eldest son of the Marquis of *Dorchester*, and the defendant was acquitted by the opinion of all the judges, for he was only Mr. *Pierpoint*. In the House of Lords, complaint was made against the Marquis of *Carmarthen*, for breach of privilege, and the House said there was no such person. The defendants were acquitted.

Indictment for assaulting a duke's eldest son, styling him by his father's second title according to common parlance, ill. Post. 509, 539, 512. Parliament Cases 2, 3, &c. 6 Mod. 303. Carth. 297. Comb. 273. Faresl. 15, 28, 38.

2. THE PRESIDENT AND COLLEGE OF PHYSICIANS, LONDON, *v.* SALMON.

S. C. 5 Mod. 327, 328. 4 Mod. 47.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 680. S. C.]

DEBT was brought in the name of the President and College of Physicians, on the stat. 14 *H.* 8. *c.* 15., for the penalty of 5 *l. per* month for practising physic in *Lon-*

Corporation may sue by their name of incorporation, notwithstanding

an express power given to sue by another. See Lutw. 510, &c. 563. Cro El. 357. Hard. 501. Hob. 210. Vid. 6 Mod. 44. 2 Bulst. 185. R. acc. 1 Ld. Raym. 153.

don without licence; and, upon demurrer to the declaration, this exception among others was taken, that the action ought to be brought in the name of the College only, or the President only; the words of the patent being, *quod ipsi per nomina presidentis collegii, seu communitatis facultatis medicinæ, London,* shall sue and be sued. To this it was answered, that they are incorporated by the name of President and College, and have in consequence of that a power to sue and be sued by that name; and this power is not taken away by the additional affirmative power which is farther given to them. 10 *Co.* 28. *b.* 30, 123. 1 *Ro. Ab.* 513. *Fitz. Brief,* 485. 5 *E.* 4, 20. 16 *H.* 7. 1. 20 *H.* 6. 4. 44 *E.* 3. 6. *b.* 11 *H.* 7. 27. 13 *H.* 7. 14. And judgment was given for the plaintiff.

[452]

3. Domina Regina *v.* The Inhabitants of Barking, Needham Market, and Darmesden Hamlets.

[Pasch. 5 Ann. B. R.]

On a certiorari to remove orders, the name of the parish in the writ, and that in the order, must appear to be the same. Vide ante 434. pl. 16. 1 Salk. 145, 146, 151. March 112. 1 Lev. 50. 1 Bulst. 159. 1 Keb. 165. Far. 97. Post. 472.

A *CERTIORARI* issued to remove all orders concerning the inhabitants of the parish of *Barking, Needham Market,* and *Darmesden* hamlets, and the orders mentioned *Barking,* and *Needham,* and *Darmesden* hamlets, without *Market.* Serjeant *Weld* argued, that they must be taken to be the same. 1 *Sid.* 64. Writ was to the Justice of *Chester;* return was by the Chief Justice; and 1 *Ro.* 334. A ward and a liberty of a city is the same: *Holt,* C. J. The Chief Justice of *Chester* in his patent is called *justiciarius,* and there was but one till 18 *Eliz. c.* 8., which gave the queen power to make another, who is styled *alter justiciarius,* and the first *justiciar,* and so our writs are directed; we therefore take notice of him, and do not regard his calling himself Chief Justice. The reason of 1 *Ro.* 334. is, (*a*) *that a ward of a city is no venue,* therefore the *venue* is from the city. A jury may come from a *lieu conus* out of the city, not from a *lieu conus* within a city. If *Needham* and *Needham Market* be the same hamlet, so it should have been returned; but we cannot take notice that there is no such hamlet as *Needham Market.* If trespass *quare clausum fregit* at *Needham* were brought, and the plaintiff proved a breaking at *Needham Market,* he must be nonsuit.

(*a*) *Sid.* 326. 2 *Cro.* 222. *contr.*

NOVEL ASSIGNMENT.

Vide 1 Mod. 89. and System of Pleading, tit. Novel Assignment and Doct. Placit. 379, 380.

1. COOKE *v.* EVANS.

[Trin. 2 Ann. B. R.]

TRESPASS for taking the cattle in *D.* The defendant pleaded, that the *locus in quo* was twenty acres, *&c.*, where he had common, and justifies for damage-feasant; the plaintiff replied, that he took them in such a place, [*viz.* another.] And it was agreed *per Holt*, C. J. and *Powell*, that the plaintiff might have a new assignment, which they told Mr. *Southouse*, *subridendo;* who neither confessed nor avoided his bar, but gave it the go-by.

Where defendant by plea makes a transitory trespass local, the plaintiff may make a new assignment. Hob. 16. 2 Cro. 141. Carth. 176.

2. HELVIS *v.* LAMB.

[Hill. 2 Ann. B. R.]

TRESPASS for taking and carrying away his goods in *D.* The defendant pleaded, that the *locus in quo* was his freehold, and that he took the goods damage-feasant, *&c.* The plaintiff demurred generally, and had judgment; for the action being transitory, there is no *locus in quo* supposed: Otherwise in trespass *quare clausum fregit in* D., the *clausum* is a *locus in quo;* but in the principal case there is no place in particular supposed, only *D.* is alleged for a *venue;* therefore if the defendant will make the place material, it must come on his part to shew a place certain: Also in trespass *quare clausum fregit in* D., if the defendant pleaded *liberum tenementum*, and issue be joined thereupon, it is sufficient for the defendant to shew any close that is his freehold; but if the plaintiff gives the close a name, he must prove a freehold in the close named: So adjudged in *C. B.*, and the judgment affirmed in *B. R.* upon a writ of error.

Where the place is made material by the defendant's plea, he must shew it with certainty. S. C. 6 Mod. 117, 119. Carth. 176. Com. Pleader 3 M. 24. vol. 5. 3d edit. pa. 804. Hob. 16, 176. 3 Cro. 812, 897. Poph. 139. Tri. p. Pais 378. 2 Cro. 594. Dy. 23, 147. Yelv. 167.

NISI PRIUS.

BULLOCK *v.* PARSONS.

[Pas. 4 Ann. B. R. 2 Ld. Raym. 1143. S. C.]

Distringas with a blank for the cause of action, amendable, S.C. Holt 496. Authority of a Judge of nisi prius is by commission of assize. Vide post. 456. Raym. 38, 73. 2 Inst. 424.

IN *debt;* after verdict for the plaintiff, Mr. *Eyre* moved in arrest of judgment, that the *distringas* was with a blank, and *debiti* (the cause of action) omitted; so it was a *distringas* in another cause. On the other side it was urged to be as no *distringas*, and aided by verdict; and that it was amendable. *Hob.* 246. 2 *Cro.* 528. The Court made two questions, 1st, Whether the judge of *nisi prius* had authority to try this issue? *Et per Holt*, C. J. The authority of the judge of *nisi prius* is not by the *distringas*, but by the commission of assize; for it is the 13 *E.* 1. *c.* 30. which gives the trial by *nisi prius*, and by that statute the trial by *nisi prius* is given before justices of assize; and at first these trials by *nisi prius* were always had and made upon the *venire facias*, and indeed the clause of the *nisi prius* is, by the 13 *E.* 1. *c.* 30., expressly ordered to be inserted in the *venire facias;* and trials by *nisi prius* continued to be upon the *venire facias* till 42 *E.* 3. *c.* 11., which requires that the names of the jurors be first returned into court. By this act two inconveniences were remedied. 1st, The party might now be prepared to make his challenges, the pannel being first returned into court, which was not before; and, 2dly, The defendant was prevented by this means to cast an essoin at *nisi prius*, which was used frequently before; for, by *Marlb. c.* 13., the defendant was allowed one essoin, and that after issue joined upon the return of the *venire:* By consequence, when that was returned at *nisi prius*, he could essoin at *nisi prius;* but now it is returned above, he must essoin above, and cannot now essoin at the trial, because the trial is upon the *distringas*, and not upon the *venire.* 3dly, The Court held no *distringas*, or the want of a *distringas*, to be aided by verdict, but an ill *distringas* was not; and remembered a case, wherein *Saunders*, of counsel at the bar, dropped the *distringas* out of his hand, that he might want a *distringas*, which would be aided, and not keep and shew an ill one, which would be naught. Also they held it amendable, and gave judgment *pro quer.*

2 Inst. 126, 127.

Want of a distringas is aided by verdict, ill distringas not. Danv. 1 part 357. Tri. p. pais 57. Hob. 246. 3 Cro. 622, 258.

NONSUIT, &c.

1 Sal. 21. 6 Mod. 95, 261. Hard. 126, 153. Raym. 38, 73. Faresl. 32, 48, 86.

1. ALLINGTON *v.* VAVASOR.

[Trin. 12 Will. 3. B. R.]

A *LATITAT* was sued out against four defendants in trespass; the plaintiff was nonsuit for want of a declaration, and the defendant's attorney entered four nonsuits against him; and it was held to be irregular, because the trespass is joint, and though the plaintiff may count severally against the defendants, yet it remains joint till it is severed by the count (*a*).

In trespass against four, there can be but one nonsuit for want of declaring.

(*a*) *R. similiter* on a judgment of *non pros.* 4 *Bur.* 2418.

2. LOVER *v.* SALKELD.

[Trin. 12 Will. 3. B. R.]

TRESPASS against two defendants, and verdict for the plaintiff; one defendant being an infant, the plaintiff took judgment against the other, and entered a *non pros.* after the judgment against the infant. Upon this judgment the plaintiff sued out execution, upon which error was brought: And Mr. *Northey* objected, that the execution and judgment could not vary from the demand of the writ: *Raymond contra.* Torts are several, and the plaintiff may as well enter a *non pros. quoad* one defendant upon a trial by verdict, as if one defendant had demurred, and verdict against the other; and that a *non pros.* may be entered after judgment as well as before; and for *non pros.* entered after judgment, he cited 15 *E.* 4. 26. 14 *E.* 4. 6. *Hob.* 71. 1 *Ro. Rep.* 379. 2 *Ro. Abr.* 100. *pl.* 5. *Holt*, C. J. said, he supposed those were interlocutory judgments wherein it might well be, but a final judgment differed; for that being once wrong, a subsequent entry would not set it right. *Adjournatur.*

Non pros. may be entered as to one defendant after interlocutory judgment, not after final. Vide 1 Cro. Hager v. Wood. Co. Entr. 650. b. & 676. b. Rast. Entr. 582. b. Hob. 70, 108. 11 Co. 50. b. 3 Cro. 762. Vide Doug. 169. (161.)

S. C. Faresl. 32.

3. COOKE *v.* FOSTER.

[Trin. 1 Ann. B. R.]

Where the defendant files bail without arrest, plaintiff may be non-prossed. Carth. 172.

IF a man appear at the day of the return of the process and put in bail, though he never was arrested, nor the process returned; yet if the plaintiff does not declare against him in two terms, a *non pros.* may be entered against him.

[456]

S. C. 1 Salk. 21. 6 Mod. 261.

4. GODDARD *v.* SMITH.

[Mich. 3 Ann. B. R.]

Vide 11 Co. 65, 66. 6 Mod. 95, 262. 1 Sid. 420. 1 Vent. 32. 5 Mod. 208. Hard. 126, 153. Comber. 18.

Entries of non pros. 6 Mod. 25, 216. 8 Co. 58. 2 Keb. 521. 5 Mod. 394. Hard. 126, 153. 1 Rol. Abr. 786. pl. 2.

A DISCHARGE by *nolle prosequi* upon an indictment, is not sufficient to maintain an action for a malicious prosecution. *Vide this case*, title *Action sur le Case*, *pl.* 11. *p.* 21.

Vide Co. Ent. 650. *d.* In trespass, several issues, one found for the plaintiff, *& super hoc idem quer. gratis hic in Cur. cognovit se ulterius nolle prosequi versus le defend. de cæteris exitibus*, upon which here is an *eat inde sine die*, and the plaintiff has judgment for the other; *et vide ibi* 676, *&c.*, issue for part, and demurrer for part, in an action of trespass, and verdict *pro quer.* upon the issue; upon which the plaintiff enters a *non pros.* in this manner: *Et super hoc idem quer quoad materiam prædict. unde partes prædict. posuerunt se in judicium fatetur se nolle materiam illam, &c., ulterius quovismodo intromittere: Ideo idem defendens eat inde sine die, &c., & superinde idem querens petit judicium de dampnis prædict. &c. Ideo consideratum est*, that the plaintiff recover; and that the plaintiff be amerced *pro falso clamore* as to the rest, *& quod defendens eat inde sine die. Vide ibi* 28. Jury came in with their verdict, and the plaintiff was nonsuit, and the entry is, *super quo querens solemniter exactus non revenit, nec est prosecutus billam suam, super quo consideratum est quod nil capiat.*

6. GREEVES *v.* ROLLS.

[Pasch. 4 Ann. B. R.]

Judge of nisi prius may receive a non pros. at the assizes. Vide ante 454. Raym. 38, 73. 12 Ed. 2. c. 4.

THE judge of *nisi prius* may receive a *non pros.* at the assizes; so it was held by two judges, and that judgment was affirmed in the House of Lords against the opinion of *Holt*, C. J. For before the statute of *York*, the justices of *nisi prius* had no power to record a nonsuit or default in the country, and consequently have no power now

to enter a *non pros.*, which is not within that statute. At common law they could not record a *non pros.*, default or nonsuit. *Nota;* The principal case was, ejectment against several, who all entered into the rule of lease, entry, and ouster; at the assizes some would confess, and others would not: The plaintiff, as to those who would not confess, entered a *non pros.*, and went on against the others, and recovered; upon this a rule was made, that in like cases the plaintiff should go on against those who would confess, and as to those who would not, should be nonsuit; but that the cause of the nonsuit should be expressed in the record, *viz.* because those defendants would not confess lease, entry, and ouster; and upon the return of the *postea*, the Court would be informed what lands were in the possession of those defendants, that the judgment might be entered against the casual ejector as to them (*a*).

In ejectment against several, if some confess lease, &c. and others do not, the plaintiff may go on as to the former, and be nonsuit as to the latter.

[457]

It was agreed in the arguing of this cause, that where there are several defendants, and they sever in plea, whereupon issue is joined, that the plaintiff may enter a *non pros.* as to one defendant at any time before the record is sent down to be tried at *nisi prius*.

Where several defendants sever in plea, plaintiffs may enter non pros. against one, any time before record sent down. 2 Rol. Abr. 100. Hob. 70.

(*a*) This case is reported in 12 *Mod.* 651. as of *Hil.* 13 *W.* It appears that the case was, that the plaintiff entered a *retraxit* at *nisi prius* as to one defendant, which the Court held to be irregular; and it was laid down, that where there are several defendants, and one refuses to confess, *&c.* he should be *acquitted*, [*not* that the plaintiff should be *nonsuit* as to him;] and thereupon judgment should be given against the casual ejector. And, as in 1 *Bur.* 359. the report in *Salkeld* is stated to be wrong, the case was probably as reported in 12 *Mod.* *Vide* also the reports of this case, 1 Ld. *Raym.* 716. *Comyns* 113.

If the plaintiff obtains judgment by default against one defendant, he cannot be nonsuit as to another, *Weller* v. *Gayton*, 1 *Bur.* 358. *Harris* v. *Butterley*, *Cowp.* 485. *Hannay* v. *Smith*, 3 *T. R.* 662.

NOTICE, &c.

Vide 5 Mod. 96, 129, 257, 330, 442, &c. 2 Show. 316, 2 Lev. 21, 106, 152. Lutw. 404, 409, &c. S. C. Post. 650.

1. LAZIER *v.* DYER.

[Mich. 2 Ann. B. R.]

ISSUE being joined and entered, as of *Trinity* term, the plaintiff rested till the *Trinity* term following, and then gave notice of trial after the term; and a *venire facias*

If there be no proceeding in fact within four terms, there

must be a term's notice of trial. Vide post. 645. 1 Mod. 1. 6 Mod. 18, 146. 6 Mod. 57. S. C. called Lerauld vers. Dyer.

and *distringas* was taken out in the vacation, but tested and entered as of the term. *Et per Cur.* This is not sufficient notice; for though in law, this was a proceeding within the term, yet in fact it was a proceeding in vacation, and therefore there was not a term's notice of trial.

1 Keb. 112. 1 Sid. 34, 231. 2 Lilly 151, 356. 2 Bl. Rep. 784. Doug. 71. Str. 531, 1164

2. SMITH *v.* GOFF.

[Pas. 4 Ann. B. R. 2 Ld. Raym. 1126. S. C.]

Notice not necessary to be alleged, where the thing can be intended to be known without it. See 6 Mod. 182, 200, 259, 288. 4 Mod. 230, 239. 5 Mod. 330. Farcsl. 143, &c. 5 Com. Dig. tit. Pleader, c. 61. pa. 362. c. 75. pa. 367. 3d edit.

PLAINTIFF declares, That whereas *H.* owed him 30 *l.* by bond, the defendant promised, that, if the plaintiff delivered up the said bond, he would pay him the said 30 *l.*, and says, he delivered up the said bond to *H.*, *unde* the defendant had notice, and had not paid it. On *non assumpsit* pleaded, verdict was for the plaintiff. Upon motion in arrest it was held, 1st, That delivery must be intended to the obligor, for that is properly a delivering up; and delivering up must be construed the most effectual delivering; which is such as that the bond may be cancelled. 2dly, There needs no *notice*, because the defendant knew whom to resort to; and the difference is, where a person is named, and where not.

[458]

NUISANCE.

Vide 9 Co. 57. &c. 5 Mod. 242 Raym. 74. 6 Mod. 145. Vaugh. 333, 340, 358. 1 Mod. 55, 76, 168, 202.

1. REX & REGINA *v.* WILCOX.

[Hill. 1 W. & M. B. R.]

Fine pardoned by general pardon, but abatement not excused. Vide Vaugh. 333. 1 Hawk. ch. 75. sec. 12. 2 Hawk. c. 37. sec. 33. Plowd. 487. 12 Co. 30.

THE owner of the glass-house at *Lambeth* was indicted for maintaining that house, being a nuisance, and was convicted and fined; and now it was moved, that by the act of general pardon the defendant was excused and discharged, both as to the fine and the abatement of the nuisance: But the Court upon consideration held, that he should be discharged only as to the fine and not as to the abatement, for that is not a punishment of the party, but a removal of that which is a grievance to other people, and any person may abate a common nuisance.

2. PALMER *contra* POULTNEY.

See 2 Mod. 233. Lutw. 1586, &c.

[Mich. 8 Will. 3. C. B. 1 Ld. Raym. 276. S. C. named Shalmer *v.* Pultney.]

QUOD permittat prosternere quædam ædificia ad nocument., &c. And the Court held, that a *quod permittat* will lie *de ædificio:* but *vide Noy* 68. 3 *Cro.* 520, 402. It lies not *de mole, F. N. B.* 110., it lies *de fabrica, F. N. B.* 184., which the Court held as uncertain as *ædificium.* Also there may be a building without a name; and the Court held, that whether the nuisance was by the tenant or a stranger, the plaintiff may maintain a *quod permittat*, for it is the same prejudice to the plaintiff. *F. N. B.* 184. *Et nota;* In a *quod permittat*, the jury have a view; but that did not weigh with the Court, for they said that could be no direction to the sheriff, though it might to the jury.

Quod permittat lies de ædificio. 9 Co. 53, 54. Cro. Jac. 555. Cro. Car. 185. 1 Rol. Rep. 394. 3 Bulst. 197. 1 Jones 222. 2 Rol. 144, 145, 565.

3. LODIE *v.* ARNOLD.

[Mich. 9 Will. 3. B. R.]

TRESPASS for breaking his close, and throwing bricks and other materials there lying *erga confectionem domus de novo erect.* into the sea; the defendant shewed it was a nuisance, being a house built across the way, and that he pulled down the walls, *&c.* and they rolled into the sea. The plaintiff demurred, and judgment was given for the defendant: And, *1st, The Court seemed to agree, that the trespass, which is justified, is not the trespass complained of, for that was throwing materials there lying; this, which is confessed, is pulling down a wall. 2dly, That when *H.* has a right to abate a public nuisance, he is not bound to do it orderly, and with as little hurt, in abating it, as can be; and therefore was not answerable in this case for the rolling into the sea. In the case of *James* against *Howard*, the defendant might have opened the gate without cutting it down; yet the cutting was lawful; and the Court denied *Hill*'s case, 3 *Cro.* 384., that matter of aggravation need to be answered. But, 3dly, the Court held, that the declaration was repugnant and insensible; there could not be materials towards the building of a house *erect.*, which is already built.

In justification by abatement of a nuisance, it need not be shewn that he did it, doing as little hurt as could be. 1 Jon. 221. 1 Hawk. c. 75. sec. 12.

[* 459]

Cro. Car. 184, 185. Vide 5 Co. Penruddock's Case. Mo. 705. 3 T. R. 292. 1 Lev. 31. 1 Salk. 213, 408.

6 Mod. 116. S. C. Vide prox. pag.

4. ROSEWELL *v.* PRIOR.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 39. S. C.]

In case for stopping lights, it must appear that the lights were ancient. See 6 Mod. 116, 314. 1 Mod. 55. 1 Lev. 122, &c. & infra. 2 Lev. 194. 9 Co. 58. Cro. El. 402. Consuevit after verdict in such action, imports usage time out of mind. 6 Mod. 20, 313, 314. Comber. 481. S. C. 1 Vent. 274, 237. Show. 7, 64. 3 Mod. 48. 3 Keb. 133. Pop. 170. Hutt. 136. Hob. 131. Carth. 454. Cases B. R. 215, 635. Holt 500. Lilly Ent. 31, 82, 83, 516. 1 Sid. 167. 1 Vent. 237.

IN *an action upon the case* for erecting a shed upon the defendant's ground, so near the plaintiff's house that it stopped up his lights; the plaintiff declared, that he was possessed of a house which had windows *per quas lumen inferebatur & inferri consuevit*. After verdict for the plaintiff, it was moved in arrest of judgment, that the house was not said to be an *ancient messuage*, and the defendant appeared not to be a wrong-doer; for one may erect a shed on his own ground against another's windows, if they are not ancient lights. 3 *Cro.* 118. And all the precedents of stopping lights have it, either *antiquum messuagium* or *antiqua lumina*. 1 *Cro.* 325. *Pop.*, 170. 2 *Cro.* 373. *Yelv.* 215. *Sed per Cur.* The word *consuevit* imports usage time out of mind, and we must intend, after verdict, that usage time out of mind was proved; and so indeed it was in this case, for otherwise the jury could not have found for the plaintiff. The Court seemed to think this declaration would not have been good upon demurrer.

3 Lev. 133. 1 Vent. 239, 248.

5. DOMINUS REX *v.* ROSEWELL.

[Hill. 10 Will. 3. B. R.]

H. erects a house which stops my lights, I may pull it down. See 6 Mod. 314, &c. supra. 1 Vent. 237, 239, 274. 2 Lev. 194. Ray. 87. 1 Sid. 167. 3 Bl. Com. 5.

IF *H.* builds a house so near mine that he stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down; and for this reason only a small fine was set upon the defendant in an indictment for a riot in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights.

[460]

S. C. ante 459. and 6 Mod. 116.

6. ROSEWELL *v.* PRIOR.

[Hill. 13 Will. B. R. 1 Ld. Raym. 713. S. C. Pleadings Lilly 81.]

F. N. B. 124. H. Cro. Jac. 373. 1 Vent. 48. 1 Mod. 27. A tenant for years erects a nuisance, and makes ...

IN an *action upon the case*, for that the plaintiff being seised of an ancient house and lights, the defendant had erected, *&c.*, whereby they were stopped. There was a former recovery for this erection, and this action was for the continuance; and the case was, tenant for

years erected a nuisance, and afterwards made an under-lease to *J. S.* The question was, Whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease? *Et per Cur.* It lies; for he transferred it with the original wrong, and his demise affirms the continuance of it: He hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions. *Vide Jones* 272. Receipt of rent is upholding. 2 *Cro.* 372, 555. The action lies against either at the plaintiff's election.

under-lease to B., plaintiff may have an action against either. See 6 Mod. 116, 314. Ante 459, &c. ib. 2 Roll. 144, 145. Cro. Car. 185. 3 Bulst. 197. 1 Jones 222. 9 Co. 55. a. Vide 4 T. R. 318.

7. DOMINA REGINA *v.* WIGG.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1163. S. C.]

INDICTMENT for keeping hogs in some of the back streets of *London, contra forman statuti.* Mr. *Whitacre* moved to quash it, because the swine are forfeited by the statute 2 *W. & M., sess.* 2 *cap.* 8. *sect.* 20. *Ergo* no indictment lies, at least not *contra formam statuti:* He compared it to the case of the Queen against *Watson*, which was an indictment for keeping an alehouse, and held not to lie, because there is another remedy. *Curia:* Where a new penalty is applied for a matter, which at common law was an indictable offence, as in this case for keeping swine in the city, which is a nuisance, either remedy may be pursued; but where the statute makes the offence, that remedy must be taken which the statute gives (*a*): And as to its being *contra formam statuti*, that is surplusage; but if that was a fault, they said they would not quash it, being for a nuisance, but he should demur; accordingly it was demurred to, and came on in the paper, and judgment given for the king (*b*). Afterwards Mr. *Whitacre* moved to set aside the judgment, alleging surprise and want of notice. *Sed non prævaluit:* But no counsel appeared for the defendant when judgment was given.

Keeping swine in a city, a nuisance at common law. See 2 Rol. Abr. 140, 141. Cro. Car. 570. 9 Co. 57, 58. 2 Show. 27, 30, 81, 327. Palmer 536. Hutt. 136. 1 Rol. 558. 1 Bulst. 115. Godb. 183. Br. Action sur le Case 123. Where the statute makes the offence, no other remedy can be pursued but what the statute gives; otherwise of a crime indictable before. Ante 45.

(*a*) *Vide* note to *Stephens* v. *Watson, Ante* 45.

(*b*) *Vide acc. ante* 212. *Cowp.* 648. *Doug.* 441. 2 *Hawk.* c. 25. sec. 115. 5 *T. R.* 163.

*** For an enumeration of cases which are or are not nuisances, *vide* note to 6th edit. of 1 *Hawk.* c. 75. sec. 11. pa. 363.

See 2 Mod. 173. 3 Mod. 108. 2 Show. 68, 475. 5 Mod. 402. 1 Chan. Cas. 11. 1 Chan. Rep. 231. Post. 549.

OATHS AND AFFIDAVITS.

1. SALLOWAY *v.* WHOREWOOD.

[Mich. 8 Will. 3. B. R.]

Where, upon shewing cause, new affidavits may be read to support the rule.

UPON a rule to shew cause, the plaintiff offered several new affidavits, and this diversity was taken, *viz.* Where they contain new matter, and where they tend only to confirm what was alleged and sworn when the rule was made; in the latter case they may be read, and not in the former.

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2. DOMINUS REX *v.* JONES.

[Hill. 8 Will. 3. B. R.]

Affidavits taken before commissioners, according to 29 Car. 2. c. 5. must be in a cause in court. 5 Mod. 74. S. C. 3 Lev. 426. Holt 501.

IF affidavits taken before commissioners in the country, according to 29 *Car.* 2. *c.* 5., be expressed to be in a cause depending between *A.* and *B.*, and there is no such cause in court, they cannot be read, because the commissioners have no authority to take them, and there can be no perjury; otherwise if there be a cause in court, and this concerns some collateral matter.

3. DAVIS *and* CARTER'S *CASE.*

Where an affidavit of a person pilloried may be read. Vide post. 513, 514, 685. 5 Mod. 15. 3 Salk. 461.

DAVIS and *Carter* stood in the pillory, and the Court would not allow their affidavits to be read; *Hill.* 7 *W.* 3. *B. R.* But *Mich.* 4 *Ann. B. R.* a motion was made to set aside a judgment for irregularity on the defendant's affidavit; and Mr. *Whitacre* objected to the reading it, because he was convict of perjury. *Et per Holt*, C. J. Must he therefore suffer all injuries, and have no way to help himself? *Powell*, J. You ought to have the record of conviction in your hand when you make this objection. But *per Holt*, C. J. If he had, it would be nothing to the purpose.

Vide Str. 1148. 2 Hawk. ch. 46. sec. 23.

OBLIGATION.

See Cro. Jac. 190, 503, 208, 290, 338, 522, 603, 607. 2 Lev. 35, 166, 220.

1. HENDERSON *v.* FOSTER.

[Hill. 3 W. & M. B. R.]

IN *debt* the plaintiff declared on a bond, *in trigint. & sex libris solvend., &c.*, and upon *oyer* the words of the bond were *sex trigint. libris*, and it was held well, and no variance; for it shall be taken as one word, as *tres vigint. dies Junii* was taken for the 23d of *June*. *Yelv.* 193. 3 *Salk.* 74.

Sex triginta libris, held well. Comber. 187. S. C. 477. 2 Show. Case 422. 2 Rol. Abr. 146, 147. Carth. 204. S. C. Skin. 310. Com. oblig. B. 3.

2. CROMWELL *v.* GRUNSDEN.

[Pasch. 10 Will. 3 B. R. 1 Ld. Raym. 335. S. C.]

5 Mod. 281. S. C. Vide ib. les Pleadings. 3 Salk. 73, 74. Holt 502. Cases B. R. 193.

IN *debt* upon an obligation, the plaintiff declared, *quod cum Robertus Erlin, primo die Julii* 1674, *per scriptum suum obligatorium concessit se teneri & firmiter obligari in quadragint. libris, &c. Et profert, &c. cujus dat. est eisdem die & anno.* Upon *non est factum* pleaded, the jury found the defendant made a deed *in hæc verba*, and that was, *in premid. vigin. in quadrans libris*, dated the 1st of *July*, *anno regni Car.* 2. *millimo sexcent. septua. qto.*, and signed *Robert Erlwin*, conditioned to pay 20 *l.*, and if this be the same deed, *&c. Et per Cur.*

Quadrans libris in a Bond. Cro. Car. 116. Mo. 864. 2 Bulst 241. Lutw. 422, 423. 2 Jones 58 1 Brownl. 110.

1st, The variance between the name signed, which is *Erlwin*, and the name in the obligation, which is *Erlin*, is not material, because subscribing is no essential part of the deed; sealing is sufficient: The bond is a deed without it, and so it is of the year of the king. *Vide Yelv.* 193.

Bond made by Erlin, subscribed Erlwin, variance not material. 2 Show. 504. Insensible words rejected. Vide prox. pag. pl. 5. 2 Mod. 285. Com. Oblig. B. 3.

2dly, The Court held the words *in premid. vigin.*, and also the *anno regni Car.* 2. *millimo sexcent. septua. qto.*, to be void for insensibility; and being insensible shall be rejected, the rest being sense without them.

3dly, They held that the word *quadrans* had been void and insensible, if it had stood by itself, as in case there had been no condition, or if the condition had been collateral; but since it has relation to the condition, they would take it to be explained by the condition, and to signify 40 *l.*, there being somewhat like *quatuor* or *quadragint.*

Sum in the obligation expressed in insensible words, explained by the condition. 2 Cro. 146. Yelv. 65. Cro. El. 417. Yelv.

105. Styl. 241, 257. 2 Rol. 147. l. 37. 45. Cro. Car. 416. 10 Co. 133.

[463]

in it, and there are cases as strong and of as odd words. *Hob.* 119. *Quamquegenta* for 500 *l.* *Yelv.* 95. *Cro. Car.* 147. *Cro. Jac.* 208. 1 *Brownl.* 62. 2 *Ro. Ab.* 146, 147. *Hob.* 19. *doubted.* In most cases where the *gent.* or *gint.* or the *sex* or *sept.* are right, the obligation has been held well. *Vide* 2 *Jones* 48. 1 *Cro.* 416, 418. 2 *Cro.* 338.

Impossible date is no date, and the plaintiff must declare of a time of making. 3 Lev. 348. 5 Mod. 248, &c. Yelv. 193. 5 Co. 5. 2 Rol. Abr. 706, 27. l. 25, &c. Faresl. 38. Gerens dat. must be understood of the express date; cujus dat. may be the delivery. 1 Brown. 110. Styl. 414. 2 Rep. 5. Cro. Eliz. 603. Noy 21.

4thly, An impossible date is no date; and where there is no date, the plaintiff nevertheless must declare of it as made at a certain time, and it is better to rest there without *cujus dat. est eisdem, &c.* or *gerens dat. eisdem:* for that ties it up to the bond mentioned in the declaration; and if that be taken to be the express date, then there is a variance; and the Court held, That if the plaintiff's declaration had been *gerens dat.* it had certainly been naught, because that could refer to nothing but the express date; but being, *cujus dat.* the Court would intend it of the real date, which is the delivery, and not of the express date; because that being insensible, and as no date, it could not properly be applied to that. *Vide* 2 *Yelv.* 193.

And the Chief Justice denied the Case, 2 *Cro.* 136.; and held, that if *H.* declares on a bond, as bearing date the 6th of *May*, he cannot upon *non est factum* give in evidence a bond bearing date at another day; but he may give in evidence a bond that bears date the 6th of *May*, though it was delivered at another day. Adjudged.

3. WELLS *v.* TREGUSAN.

[Mich. 7 Ann. B. R.]

Condition of a bond (reciting a debt) not to pay, is repugnant. See 2 Show. 15, 16, 504. 1 Lev. 77, 85. Raym. 61. 2 Saund. 79, 80. 2 Mod. 285. Rep. A.Q. 191, 199. S. C.

DEBT on a bond for 100 *l.* defendant demands *oyer* of the condition, which was, whereas the defendant is truly indebted to the plaintiff in 50 *l.* Now the condition is such, that if the defendant do not pay the said 50 *l.* on or upon, *&c.* then the obligation to be void, *&c.* and pleads, that he did not pay the said 50 *l.* The plaintiff demurred and had judgment; for when the condition recites debt, and after lays an obligation not to pay it, it is in that repugnant. *Vide* 1 *Sid.* 109. 1 *Lev.* 77. 39 *H.* 6. 10. *a.**

OCCUPANT AND OCCUPANCY.

Vide Vaug. 190, &c. 3 Leon. 36. 6 Mod. 66. Carth. 65, 66. 2 Keb. 250.

OLDHAM v. PICKERING.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 96. S. C.]

Estate pur autur vie are only assets for the payment of debts, not of legacies, unless given thereout expressly; nor distributable. Vide ante 415, &c. Carth. 376. S.C. Comb. 388, 475. S. C. 3 Salk. 137. Holt 503. Cases B. R. 103. 3 D. 379, 8, 30. 409. p. 5.

IN *attachment for prohibition* the case was briefly thus: *Thomas Oldham* being seised of a messuage in the county of *Chester*, to him and his assigns for three lives, died intestate without children, leaving only *Anne Pickering* his sister: Administration was committed to *Margaret Oldham* the plaintiff, whom the defendant now sues in the spiritual court of *Chester* for distribution, and to exhibit an inventory, which she exhibited and omitted thereout the estate *pur autur vie;* whereupon the single question was this, Whether an estate *pur autur vie* be not distributable in like manner, as intestates goods and chattels are, according to 22 & 23 *Car.* 2. by force of 29 *Car.* 2. *c.* 3. which enacts for the amendment of the law, that an estate *pur autur vie* shall be devisable, and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by discent; as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

And after a long argument by *Cheshire* for the plaintiff, and by *Ward* for the defendant, the whole Court, *viz. Holt*, *Rokeby*, *Turton*, and *Eyre*, unanimously gave judgment, That the prohibition should stand, and that an estate *pur autur vie* belonging to an intestate, was not distributable; for, notwithstanding this alteration by the statute, it remains a freehold still; and the amendment of the law in this particular, was only designed for the relief of creditors; that, if it came to the heir by reason of a special occupancy, it should be in his hands assets by descent, that is, liable to the payment of those debts where the heir is chargeable, and of those only; but if there was no special occupant, then it should go to the executors or administrators, *i. e.* they should be in the room of the occupant, and it shall be assets in their hands, *i. e.* they shall be bound to pay the debts of the deceased to the value thereof; so that it is not so much as assets to pay legacies, except such as are devised particularly thereout, the statute [465]

making it assets only for this particular intent, to pay creditors; and no debts appearing in this case, the administrator is as it were the occupant, and shall not be compelled to make any distribution thereof, as he shall of goods and chattels, according to 22 & 23 *Car.* 2. (*a*)

(*a*) *Vide* Duke of *Devon* v. *Atkins*, 2 *P. Wms.* 382. *Witter* v. *Witter*. 3 *P. Wms.* 101. In the latter case it was held, that an estate *pur autur vie* was distributable in *Chancery*; and it is enacted by stat. 14. *G.* 2. ch. 20. that the same shall be distributed as personal estate.

See 1 Lev. 2, 76. Lev. 71, 150, 245. 3 Lev. 200, 145, 288. 1 Lutw. 381, 1562. Raym. 53.

OFFICES AND OFFICERS.

1. JONES *v.* PUGH.

[Mich. 3 W. & M. B. R.]

Judicial office may be granted to two; but if one dies, it shall not survive, unless said to the survivor. Vide 2 Mod. 95, 96. 1 Vent. 296. S. C. 4 Mod. 16, 17, 19, 27. 1 Show. 288. Cases B. R. 10, 11. Co. 3, 6. Carth. 213, 350. Comb. 334. Skin. 446, 580. Com. 5. Officer, B. 4. 3d ed. pa. 131.

CASE for disturbing the plaintiff in his office of vicar general. A special verdict was found, *viz.* that the bishop of *Landaff* granted the office of vicar general to the plaintiff and *J. S. habend. conjunctim & divisim*, *exercend. per se vel sufficien. deputat'*. It was objected, that a judicial office could not be granted to two; for if they differ, nothing can be done: Answer, that may be said of four judges, as in *B. R.* and in ministerial offices, as two sheriffs: The Court held the grant good; and said, If an office be granted to two, and one dies, the office does not survive, but determines; as if two sheriffs, and one dies, the other cannot act; otherwise if granted to two and the survivor of them.

4 Mod. 276, 277. S. C.

2. DOMINUS REX *v.* KEMP.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 49. S. C.]

King grants an office to A. durante beneplacito, and afterwards grants the same to B. to commence after the death, surrender or for-

A *SCIRE facias* was brought to repeal letters patent, whereby King *Charles* the Second granted to the defendant *Kemp* the office of searcher in the port of *Plymouth*. The case was, King *Charles II.* had granted this office to *A. durante beneplacito;* and afterwards by other letters patent, reciting the first, granted it to *B.* for life, to commence after the death, surrender, or forfeiture of

A. Afterwards *B*. surrendered to the king, who, in consideration of the surrender, granted the office to the defendant *Kemp*, to commence after the * death, forfeiture, surrender, or other determination of the estate of *A*.

Cases B. R. 77. Holt 419. 2 Rol. Abr. 154.

feiture of A. the latter grant is good. 3 D. 161. p. 12. Comb. 334. Skin. 446. 580. Carth. 350. Com. Officer, B.

[* 466]

It was objected, that the grant and patent to *B*. was void, because *A*.'s estate being at will, could not be surrendered nor forfeited. Also an estate of freehold cannot depend upon an estate at will.

Cro. Car. 279. 6 Rep. 35. Carth. 350. S. C.

Et per Cur. An estate at will in lands cannot be surrendered, because it is determinable by the will of either party; but such an office at will is not properly at the will of both parties, but at the will of the king only; the party cannot determine his will, but by surrender; for if it be an office of trust, a mere forbearance to execute will be an offence, and finable; and surrender is the constant practice in such cases. So did the Chief Justices *Hale* and *Scroggs*.

Office at will is at the will of the king, and not of party, and may be surrendered. Hob. 150, 151. Dyer 80. b. 259. a.

2dly, It may be said forfeitable in some measure, and the king's tenants at will may be said to forfeit; for in case of forfeiture, the king will be informed by inquisition before he determine his will, and then upon the return of the inquisition the office is forfeited; but if it were an estate for life, there must be a *scire facias* to repeal the letters patent.

King's tenant at will may forfeit; and there must be an inquisition. 2 Brownl. 241.

3dly, If the king had turned out *A*., the grant to *B*. may take effect, though not immediately, yet after the death of *A*. the king shall appoint another in the time.

Dyer 197. b. 1 And. 6. 3 Leon. 5.

4thly, That a freehold of lands cannot be granted to commence *in futuro*, or depend upon an estate at will; but a new office, or a rent *de novo*, may be created to commence *in futuro*, *&c*., for it is the creature of him that makes it; and it is no otherwise in being than it is in grant. And the king doth not grant a reversion, but in reversion; and that not in respect of a particular estate, but because he is pleased to grant *in futuro*.

A freehold to commence in futuro may be in a rent de novo, or in an office. Vide post. 577. 4 Mod. 280, 28.

3. GULLIFORD *v*. DE CARDONELL.

[Hill. 8 Will. 3. B. R. S. C. Com. 1.]

IN *debt* on an obligation; on *oyer* the condition was, that whereas the defendant was made deputy to the plaintiff in his office, if he pay the plaintiff half the profits, then, *&c*. The defendant pleaded the statute 5 & 6 *Ed*. 6. *Et per Cur*. This bond is not within the statute, because the condition is not to pay him so much in gross, but half the profits, which must be sued for in the principal's name;

Bond given by deputy to principal to pay him half the profits of the office, good. See 6 Mod. 234, &c. 3 Keb 552, 650, 678, 711, 717. Post.

468. Cro. Car. 361. Cro. Jac. 269. 2 Vent. 79. Comb. 356. S. C.

for they belong to him, though out of them a share is to be allowed to the deputy for his service.

Cases B. R. 9. Holt 406. Str. 1027.

[467]
Vide Raym. 53.

4. SAUNDERS v. OWEN.

[Trin. 10 W. 3. B. R.]

Custos rotulorum may appoint the clerk of the peace without deed. See 3 Mod. 150. quære 147. Vide Noy 147, 148 Carth. 426. S. C.

IN an assize of novel disseisin for the office of clerk of the peace of *Kent*, the recognitors found a special verdict, *viz.* That the Earl of *Winchelsea*, being *custos rotulorum* of that county, made *P. Owen* clerk of the peace, to hold at his pleasure, by writing under his hand and seal; and, because the justices of peace at sessions scrupled to admit him upon this paper, the Lord *Winchelsea* came into court, and said, *I nominate* P. Owen *to be clerk of the peace, according to act of parliament.*

5 Mod. 386. S. C. 3 Salk. 250. Carth. 426. Comb. 317. Case B. R. 199. Lil Ent. 278. 1 Ld. Raym. 163, 164. Sho. 530.

And the Court held, that it always belonged to the *custos rotulorum* to nominate the clerk of the peace, but the clerk of the peace was removable whenever the *custos* was removed or changed; and moreover was removeable at the will of the *custos* till 32 *H.* 8., which makes him to continue in *quousque* the *custos* shall continue in. Now, by the late act, he is to continue for life; and though the words be, *give and grant to him*, yet it is only an appointment, and consequently may be without deed: That it cannot be a grant from the *custos*, or enure as such, is plain, because the *custos* is only at will; and he that has an office at will cannot make a grant for life, because there is no original estate sufficient to bear it; therefore this must enure as an appointment, or the execution of a power given by the statute; like a power to an executor to sell, or a tenant for life to make leases; the consequence of all which is, that this was a good appointment, though without deed; for whatever is to take effect out of a power or authority, or by way of appointment, is good without deed; otherwise, where it takes an effect out of an interest, and is to enure as a grant; for then, if it be of a thing incorporeal, it must be by deed. Held upon a writ of error of a judgment in the Common Pleas.

Whatever is to take effect out of an authority, or by way of appointment, is good without deed.

5. ANONYMOUS.

[Mich. 11 Will. 3. B. R.]

SERJEANT *Darnell* moved against the clerk of the county-court, for granting a *replevin* without taking a bond or surety of the plaintiff to prosecute; but the Court

made no rule, because it was a stale cause of complaint near two years ago; besides, it was only a single instance; but the Court said, that when it grew into a practice, as if a sheriff constantly or frequently used to let persons at large without bail, then it is an abuse of his office, and the Court will interpose. *Per Cur.*, *Holt absente*, Bring your action. Vi. 4 Bur. 2007.

6. GODOLPHIN *v.* TUDOR. [468]

[Mich. 3 Ann. B. R.]

SIR *William Godolphin*, being auditor of *Wales*, made a deputy *quamdiu se bene gesserit*, who, by articles of agreement between them, was to have the fees, and in consideration thereof to pay Sir *William* 200*l.* *per annum*, and save him harmless. In debt on the bond for performance, judgment was given against the plaintiff. 1st, The Court held this an office within the statute 5 & 6 *Ed.* 6. *c.* 16.

Bond by deputy to pay a certain sum out of the salary or profits is good; but where it is without relation to the salary or profits, void. Vide ante 466. pl. 3 3 Keb. 552, 659, 678, 711, 717. 6 Mod. 38, 234. S. C. 3 Salk. 251.

2dly, The Court held, That where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good: So if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good; for in these cases the deputy is not to pay, unless the profits rise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to the fees, they still continue to be the principal's; so that as to him, it is only reserving a part of his own, and giving away the rest to another; but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events, and such bond is void by the statute.

Vide H. Bl. Rep. 331

N. This judgment was afterwards affirmed in the House of Lords. 1 *Bro. P. C.* 101.

7. LEE *v.* DRAKE.

[Trin. 4 Ann. B. R.]

CASE wherein the plaintiff declared, *quod cum extitisset* clerk of such a parish, the defendant disturbed him in the exercise of his office, and hindered him to sit in the clerk's seat, *per quod* he lost the profits of his office. It was objected, that this was rather a service or employment than an office; that if it be an office, it is ecclesiastical, for of

Case for disturbing him in the exercise of the office of parish clerk. Vide 6 Mod. 19, 21, 233 4 Mod. 418. 2 Mod. 238. Mo. 706.

common right the parson appoints the clerk, and the Court will not intend a custom; and unless a clerk comes in by the election of the parishioners according to custom, he has not a temporal right; and the Court will not grant a *mandamus* for a clerk, without an affidavit that he is appointed by the parish. 2dly, It does not appear that any fees appertain unto this office, and no action lies at common law for disturbance in the enjoyment of a seat in the church, without a temporal right; and so it is here. *Adjournatur.*

Vide ante 435, *Non-attendance is good cause of forfeiture of an office.*

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[469]

OFFICE FOR THE KING.

Vide Hard. 11, 12. 3 Lev. 290. Vaugh. 62, 64, 153. 3 Mod. 335.

1. LAYTON *contra* MANLOVE.

[Mich. 2 W. & M. In Canc.]

Inquisition finding some points well, and nothing as to others, may be supplied by melius inquirendum; otherwise, if defective in the points found.

SEVERAL voluntary escapes being committed by *Manlove*, the warden of the *Fleet*, an inquisition was found, and the king granted the said office to *Layton;* and now the commissioners of the great seal refused to seal the same, being of opinion that the inquisition was void, and ought to be quashed, because it does not find what estate *Manlove* had in the office; for there are two sorts of inquisitions, the one to inform, and that need not be so certain, *Mo.* 308., the other to vest and entitle the king to grant, and that must be certain. *Jones* 71, 77. 3 *Cro.* 895. And here no certain estate is found to vest, and a *melius inquirendum* cannot supply this defect; for where an inquisition is defective and uncertain, that cannot be supplied by *melius inquirendum;* but where it finds some points and not others, and that which is found is well found, there may be a *melius inquirendum*. *Per Holt*, C. J., *Pollexfen*, C. J., and *Nevil*, J. (*a*).

(*a*) In the case *ex parte Duplessis*, 2 *Vez.* 538. it was ruled, that finding a person not an alien did not conclude the crown, and that a *melius inquirendum* should go. The rule laid down here, and in the report of this case, 3 *Mod.* as to a *melius inquirendum*, is considered as erroneous by Ld. *Hardwicke*, and Ld. Ch. Baron *Parker*, who assisted him. A doubt is suggested as

to the fidelity of the report, as *Levinz* is silent upon the subject. The Lord Chancellor also intimates a doubt as to the principal point, because, when no estate is found, it should be presumed that the office is held in fee. He observed, that all that could be sensibly collected from the rough account of the case in the books, is a contention that the crown might avail itself of the forfeiture. A *melius inquirendum* is only grantable on the part of the crown, 3 *Atk.* 5.

2. LINCH *v.* COOTE.

[Hill. 8 Will. 3. B. R.]

TENANT for life, remainder to his first son in tail, remainder to *J. S.* in fee: Tenant for life is attainted of high treason, and dies without issue. It was objected, that the whole estate being vested in the king by 33 *H.* 8., without any office finding the special matter, [*the person*] in remainder cannot enter, for the statute vests it in the king like a general office; and if a general office had been found, it would have been supposed a fee. *Holt*, C. J. No other estate vests in the king, by virtue of the act of parliament, than the party attainted had; just as if a special office had been found: and therefore in this case, as in that, the remainder-man may enter on the king, his estate being determined, for the statute saves the rights of others; otherwise, where an office finds an estate in fee in the party attainted, for then it must be avoided by traverse, or *amoveas manum*. *Vide Dyer* 335. *b. Hob. Sheffield* and *Ratcliffe*, *Moor* 109. 3 *Cro.* 640. *Dy.* 354. *pl.* 230.

A. tenant for life, remainder to B. in fee; A. is attainted. King seizes, B. may enter on the king, otherwise if an office had found A. seized in fee. Vide Stamf. Prærog. 67. Fearne 427, (209).

ORDERS OF JUSTICES OF THE PEACE. [470]

[*Vide* Titles *Apprentices*, *Bastards*, *Justices of the Peace*, *Poor*, *Sessions*. See also *Burn's Justice*, under the Titles *Poor*, &c. &c.; and *Burrow's Sessions Cases*.]

1. *Inter* INHABITAN. DUMBLETON *and* BECKFORD.

[Pas. 7 W. 3. B. R.]

ON a *certiorari* was returned an order of sessions in *Gloucestershire*. A girl of near thirteen years old had been at *Dumbleton* in the said county, and had always lived

Order to remove to B. because father last settled there, ill. Ante

427. Comb. 380, 381. Mod. Cases 87. Set. and Rem. 158. S. C.

there with her grandmother: Her father was legally settled at *Beckford* in the same county: She wanting relief, was by the order charged on *Beckford*, because her father was settled there. *Et per Cur.* The order must be quashed (*a*); for though till eight (*b*) years children are counted nurse-children, yet they must afterwards have maintenance from the parishes where they themselves are settled, and for any thing appears she may have gained a settlement.

(*a*) *R. acc. Foley* 271. 1 *Sess. case* 45. *Vide* 1 *T. R.* 164.

(*b*) The law is now seven years. *Vide post.* 528.

2. ANONYMOUS.

[Mich. 7 Will. 3. B. R.]

In orders to discharge apprentice, the very discharge under seal need not be returned. Vide post pl. 4. 1 Saund. 316.

IF an apprentice be discharged from his master, the statute requires that the discharge be under the hands and seals of four justices of the peace; but, in a *certiorari* to remove the order, it is sufficient in the return to take notice of the order so made; for it is not necessary to certify the discharge itself.

3. DOMINUS REX *v.* RANDALL.

Sessions cannot suppress an alehouse licensed, unless for disorder. 3 Salk. 27. S. C. Holt 405. Set. and Rem. 265.

[471]

BY a *certiorari* two orders were removed from the sessions of *Middlesex;* the first whereof recited, That whereas *R. Randall* had lately taken a house at *Hoxton*, designing to sell ale and beer there; and whereas the house had never been inhabited but by merchants and men of quality, and there were alehouses enough in *Hoxton* already; therefore it is ordered that no licence be granted to any house in *Hoxton* wherein ale was not formerly sold, and that no licence should be granted to *Randall*. The second order recited, That whereas a licence was surreptitiously gotten by *Randall* from two justices of peace, that yet his house should be suppressed from drawing of ale: And it was moved to quash these two orders, because by 5 & 6 *E.* 6. *c.* 25., the quarter-sessions cannot control two justices of peace in this affair. *Per Holt*, C. J. This difference has been taken: If authority be given to two justices of peace to do an act, and from that act there is no appeal, then it may commence at the sessions; but if an appeal be given, then they cannot begin at the sessions, as 43 *Eliz.* and 18 *Eliz.* till 3 *Car.* 2. But the true objection here is, that except for disorder the justices of peace cannot, at their sessions, suppress an alehouse licensed by two justices of peace; and the order was quashed.

Comb. 17. Brownl. 296. 1 Salk. 45, 46. 1 Saund. 249. 2 Keb. 506. Godb. 178.

4. DOMINUS REX v. GATELY.

S. C. 5 Mod. 139, 140. Comb. 353. Set. and Rem. 131.

[Mich. 7 Will. 3. B. R.]

Power to discharge apprentices, extends only to such trades as are specially named in the statute. Ante, pl. 2. S. C. Carth. 198, 366. 1 Saund. 313 to 317. 1 Vent. 174, 175. 1 Mod. 2, 286, 287. 1 Salk. 67, 68.

ON a *certiorari* it was moved to quash an order of Sessions for the discharge of one *Edward Green* from his apprenticeship to the defendant *Gately:* The fact was, that *Gately* was a mountebank, and being at a place in *Yorkshire*, where he kept a public stage, *Green* was by indenture bound apprentice to him in this manner, *viz.* to *Robert Gately*, surgeon, to learn the trade he now useth; and immediately he went upon the stage, and ever since continued in the employ; after which, being with his master *Gately* in *Middlesex*, he complained to the justices that his master did not teach him the trade, upon which they discharged him; this being done, *Green* set up the trade of mountebank himself. Mr. *Northey* moved to quash the order, the justices being willing, because they were imposed upon: 1st, He excepted to the form of the order, that they ordered the servant to be discharged from his master, whereas the discharge should be mutual. 2dly, Because the stat. 5 *Eliz.* in discharging apprentices is confined, and extends only to apprentices mentioned in that clause, and there neither surgeon nor mountebank is mentioned: And though a surgeon may be a trade within the statute, which a man cannot exercise without serving an apprenticeship to, because that clause of the statute is general; yet this part of the statute, relating to the discharge of apprentices, extends only to trades there mentioned. *Per Cur.* As to the first, the discharge of the servant is by consequence a discharge of the master; and as to the second, the clause of the statute relating to the discharge of apprentices is general, and goes to all manner of apprentices, even to those of merchants, as it was adjudged in *Hawksworth*'s and *Hillary*'s case, 1 *Saund.* 314. But afterwards the Court was of opinion, that the power of discharging reaches only to the trades mentioned in the statute, among which a surgeon is not mentioned; for that though as to the serving seven years' apprenticeship, a surgeon comes under the general terms of arts and mysteries; yet the power of discharging reaches only to the trades particularly mentioned (*a*), and this point was not stirred in *Hillary*'s case; and in *Watkin*'s case, 2 *Keb.* 822. *Hale*, C. J. was of another opinion. [472]

(*a*) *R. contr. Str.* 663. *Adm. cont.* 1 *Bott.* 3d edit. 515.

5 Mod. 208, 209. S. C. called Rex vers. Inhabitants of Harwell. 3 Salk. 256. Set. and Rem. 266.

5. *Inter* INHABITAN. PAROCH. OSWELL *and* WOKING.

[Pasch. 8 Will. 3. B. R.]

Sessions may affirm or quash, but not supersede an original order, or make a new one. Vide Fares. 10. Post. 483, 608. Comb. 296, 396. 5 Mod. 395.

AN order was made upon appeal, setting forth, that by the order of two justices, upon a controversy before them between the parishes of *Woking* and *Oswell*, a poor person was removed to *Oswell*, and that upon complaint of the churchwardens of *Oswell*, the sessions ordered their order to be superseded, and that the person should be removed to *Waking* aforesaid; and it was objected, that the act of parliament only gives the sessions power to affirm or quash, but not to supersede an order, or to suspend it for a time; and that the case before them being for the parish of *Woking*, an order made by them for another parish not concerned, *viz.* the *parish* of *Waking*, must be void, and that the word aforesaid would not help it, because *Oswell* was the parish last mentioned. *Per Cur.* Superseding is not a proper word, for there is a difference between a *supersedeas* and a repeal. A commission of *oyer* and *terminer* that is superseded may be revived by *procedendo*, without granting a new commission; but that cannot be in the case of a repeal, though this word is commonly used by justices of peace upon such occasions; and then there is a plain difference between *Waking* and *Woking*, for by what appears they may be two distinct parishes. But no judgment was given, for the cause was referred to a judge of assize (*a*).

Ante 552.

(*a*) *Vide* 2 *Str.* 1168. 1 *Sess. ca.* 280. *R.* 1 *Str.* 6. That a *supersedeas* to an order may, on the ground of surprise, be made by the justices who granted it.

6. *Inter* THE INHABITANTS OF THE PARISH OF ST. NICHOLAS *and* ST. HELEN.

[Trin. 8 Will. 3. B. R.]

Where notice shall be presumed. Vide post. pl. 17. 2 Lev. 22. Comb. 382. Set. and Rem. 192. S. C.

TWO orders were made for settling one *Rice*, a poor man, the first by two justices, the other by the sessions on appeal, confirming the former. The fact was, *Rice* being six years ago legally settled at St. *Nicholas*'s, clandestinely came into the parish of St. *Helen*, and lived there without giving notice to the officers of the parish of St. *Helen* during all that time; they sent him back to the parish of St. *Nicholas*, &c. And the question was, Whether living in St. *Helen*'s so long as six years, should not

[473]

induce the Court to presume notice and other things requisite well done, to gain a settlement? *Et per Cur.* No person, that is not a removable person, is to give notice; as he that rents a tenement of 10 *l.* *per annum*, a servant, *&c.*, need not give notice, because they cannot be disturbed: In this case, if it had appeared upon the order, that the parish of St. *Helen* had taken notice of him, and looked upon him as one of the parish, as by receiving of him, making him an officer, *&c.* there, after so long a time, we would have presumed notice given, because the notice need not be exactly proved; for the churchwarden to whom it was given, and the witnesses attesting the matter, may be dead; but here it is returned on the order, that he clandestinely removed himself, so that he might easily continue in the same manner; wherefore in such cases we must construe the statute strictly; and therefore, the order was confirmed.

5 Mod. 454.

Vide post. pl. 17.

7. *Inter* PAROCH. TROBRIDGE *and* WESTON.

[Mich. 8 Will. 3. B. R.]

5 Mod. 325. S. C. Set. and Rem. 244. Holt 572.

IT was moved to quash an order of two justices, which recited, *Whereas* B. *is, as we are credibly informed, the place of his legal settlement,* not averring that it was the place of his last legal settlement, as it ought; for that the statute says, the poor person shall be removed to the place where he was last legally settled; and it was quashed.

Note; Mich. 3 *Ann. B. R.* it was held, that legal settlement, and last legal settlement, are the same thing, because by every new settlement the precedent is discharged.

Informed that B. is the place of legal settlement, ill. Vide post. pl. 23, 26, & pag. 492, &c. Ib. Comb. 413. 5 Mod. 337. Set. and Rem. 32. 1 Sess. Cas. 131. Str. 78.

8. ANONYMOUS.

[Mich. 8 Will. 3. B. R.]

AN order was made by two justices to remove a poor person, and exception was taken, that it did not not appear by the order that the justices were of the division, or that either of them was of the *quorum:* The last was held a good exception (*a*,) but the first over-ruled, for in that the statute is only directory.

Removing need not be by justices of the division. Post. pl. 30. Comb. 285, 400.

(*a*) By stat. 26 *G.* 2. *c.* 27. No order shall be set aside for not expressing that one of the justices is of the *quorum.*

5 Mod. 321, 322. S. C.

9. *Inter* INHABITANT. CHITTINSTON *and* PENHURST.

[Mich. 8 Will. 3. B. R.]

One justice for removal must be of the quorum. Vide 6 Mod. 180. 5 Mod. 149, 162, 208, 321, 322. 325, 330

AN order for removal of a poor person was quashed, because it was not said that one of the justices was of the *quorum*. *Holt*, C. J. said, This had been doubted, and perhaps * adjudged otherwise before; but that he was of a different opinion; for this being a special authority, it must appear to be pursued (*a*).

[* 474]

(*a*) *Vide* note to preceding case.

10. DOMINUS REX *v.* DOBBYN.

Justices residing in the county, not enough. S. C. 5 Mod. 329. called Rex ver. Turner.

AN order of two justices was quashed, because it did not appear they were justices of the county, or for the county, but only residing in the county.

Vide post. pl. 16 & 34. 2 Sess. Ca. 76. Bur. Set. Ca. 23.

11. DOMINUS REX *v.* TURNOCK.

[Mich. 8 Will. 3. B. R.]

Orders made upon 43 El. c. 2. must be at the quarter-sessions. S. C. Comb. 418. by the name of Rex v. Charnock.

INDICTMENT for refusing to relieve and maintain *Eliz.* the wife of his son *John Turnock*, according to an order made in the sessions; which order was set forth in the indictment *in hæc verba*, viz. *Ad generalem session. pacis tent. apud Marlb. in & pro com.* Wilts, *&c.*; and, at the motion of Mr. *Eyre*, the indictment was quashed, because the order was only said to be made at the general sessions, and not at the general quarter-sessions; for the quarter-sessions are appointed by 2 *H.* 7. *c.* 4., though it appears by the same statute, that there may be a general sessions at other times; and 43 *Eliz.* *c.* 2. *s.* 7. appoints orders in these cases to be made at the general quarter-sessions.

12. *Inter* INHABITAN. *of* MUCH-WALTHAM *and* PERAM *in* ESSEX.

[Mich. 8 Will. 3. B. R.]

Set. and Rem. 274. S. C. Bastard born pending an illegal or-

MR. *Comyns* moved to quash an order of sessions for the settlement of a bastard-child of *E. L.* She being big with child, a little before her delivery was removed, by the

order of two justices of peace, from *Much-Waltham* to *Peram;* before the next sessions she was delivered at *Peram* of a bastard-child. At the sessions *Peram* appealed, and the justices adjudged the woman to be legally settled at *Much-Waltham*, and ordered her to be sent back thither; after which an order was made for settling the child at *Peram*, which *Comyns* moved to quash, because, though regularly bastards must be maintained where born; yet in this case, where there seems to be a contrivance, it shall not be so, as in *Tuming's* case, 2 *Bul.* 349. Whensoever an order is reversed, all things happening subsequent thereunto, shall be avoided thereby: This child being born pending the order, shall be esteemed in law to be born in that parish whereunto the mother on the appeal is returned back. The Court seemed to agree to this; and a rule was made to shew cause, but none was shewed.

der of removal from A. is settled in A. Vide 1 Salk. 121. Post. 485. 528, 532. 6 Mod. 213. Bulst. 349. Carth. 397. 5 Mod. 204.

13. THE CASE OF THE PARISH OF AMNER. [475]

[Mich. 8 Will. 3. B. R.]

THE case was, at the complaint of the churchwardens of *Terrent-Keinston* in *Dorsetshire*, to Sir *John Morton* and *John Gould*, two justices of the peace of the said county, concerning a poor man and his wife; they the said justices adjudged him to be last legally settled at *Tirrin-Crawford*, upon which they appealed; and there it was ordered, that it appearing to the sessions that he was last settled at *Amner*, therefore they discharge *Tirrin-Crawford*, and order the poor man to be removed to *Amner:* This was quashed upon the motion of Mr. Serjeant *Gould*, because this was to make an original order, which the justices at sessions have no power to do; they might have reversed the first order, and ordered the party to be carried back to *Terrent-Keinston*, but they could not remove the party to *Amner*, a third parish, who was no ways concerned in the order or appeal; and if they are really chargeable with it, it must be at the complaint of *Terrent-Keinston* to two jusces of the peace.

Sessions on appeal cannot send to a third place, not party. Post. pl. 20, 25, 32, 45, and 58. S. C Set. and Rem. 268.

Comb. 286.

14. *Inter* THE INHABITANTS OF THE PARISH OF CHITTINSTON *and* PENHURST.

[Mich. 8 Will. 3. B. R. *Vide ante. pl.* 9.]

AN order was made to remove a poor person from *Chittinston* to *Penhurst*, and this was quashed, because it was not said that one of the justices was of the *quorum*.

Authority given to justices of the peace must be exactly pursued.

Vide Farcsl. 99. Mod. Cases 99. S. C. 5 Mod. 321. Set. and Rem. 271. Holt 507.

Holt, C. J. said, that some indeed had been of opinion that an order was good, notwithstanding this omission, and perhaps it has been so adjudged: but he was of opinion, that this being a special authority to justices out of sessions, it ought to appear that that authority was exactly pursued.

15. DOMINUS REX *v.* MATTHEWS.

[Hill. 8 Will. 3. B. R.]

Upon motion to quash an order of bastardy, the reputed father must be present in court. 6 Mod. 180. 1 Bl. Rep. 198.

MR. *Montague* moved to quash an order for maintaining a bastard-child: 1st, Because it was not said the child was likely to become chargeable: And, 2dly, The defendant was ordered to pay 18 *d. per'* week *indefinitely*, without limiting any certain time. *Shower* answered, that no order relating to a bastard-child can be quashed, except the reputed father be present in court, *quod Curia concessit;* however this being a hard case, a rule was made to shew cause; and being stirred again the next term, the Court would not quash it till the reputed father came into court; and the first exception was over-ruled; for it is self-evident that every bastard-child is likely to become chargeable.

16. PURNALL'S *CASE.*

[Hill. 8 Will. 3. B. R.]

Vide 5 Mod. 329. Ante, pl. 11. Post. pl. 34. S. C. Set. and Rem. 140.

AN order upon *H.* for maintaining his daughter, was quashed, because it was recited to be made *ad generalem sessionem pacis,* and not *ad quarterialem sessionem pacis*, according to the statute 43 *Eliz. c.* 2.

17. *Inter* THE INHABITANTS OF TALBURY *and* THE HAMLET OF FOSTON IN SCROPTON.

[Hill. 8 Will. 3. B. R. S. C. Foley, 123.]

Nothing will amount to notice in writing to make a settlement that is not specified in 3 & 4 W. & M. c. 11. Ante, pl. 6. Comber. 382. 5 Mod. 454.

AN order was made by two justices of the peace in *Derbyshire*, to remove *Robert Floud* to *Foston* in the parish of *Scropton*. Upon appeal the first order was quashed, and the party ordered to be removed to *Talbury*, and the matter of fact being now stated specially to the Court; the case was,

Floud was born in *Talbury*, and served seven years apprenticeship there, which ended in the year 1693, since 1693 he lived in *Foston* and other places out of the parish of *Tal-*

bury, and the blacksmith that lived at *Foston* dying, and the inhabitants wanting one, in 1694 *Floud* went thither, and rented the shop, and a chamber of the widow of the former blacksmith for a year, at 52*s. per annum*, with the consent of the bailiff of the lord of the manor: Here he worked publicly, was publicly employed by the parishioners, and particularly by the bailiff of the lord of the manor, the vicar, and the justice of peace; and now, having never given notice, nor rented a tenement of 10*l. per annum*, or exercised any office, the question was, Whether this public way of living was not *tantamount* and equivalent to notice in writing, which was only designed to prevent clandestine entries and livings. *Et per Cur.*, This public notice taken by the parish might perhaps have satisfied the statute 1 *Jac. 2.*; but there being doubts concerning the notice prescribed by that act, the 3d and 4th *W. & M. c.* 11. was made to explain it, and this latter statute hath particularized the notice, and what shall be *tantamount* to it, and what not (*a*); but this is not among the particulars of the statute; for which reason the order was confirmed. Carth. 28.

(*a*) *R. acc.* 2 *Bott.* 3 ed. 124. *Foley* 110. *Str.* 835. *Post.* 534.

18. HATTON'S *CASE*. [477]

[Hill. 8 Will. 3. B. R.]

Order of bastardy under the hands of more than two justices, well. Post. pl. 22. Mod. Cases 180. S. C. Set. and Rem. 272.

AN order was made by five justices to maintain a bastard-child; and it was objected by *Broderick*, that the complaint is not said to be by any parish or officers there, but only of a town which may include several parishes; but the Court held that well enough. 2dly, That the order is under the hands of five justices, whereas it should be only the two next; but the Court held that well, for the statute is not restrictive to two, but there must be two at least. 3dly, That it does not appear that either of those was a justice of *quorum*; upon this it was quashed, but the party was bound to appear at the next sessions.

19. *Inter* INHABITAN. COCKFIELD *and* BOXSTEAD.

[Hill. 8 Will. 3. B. R.]

Sessions. Comber. 418. S. C. Set. and Rem. 177.

ANNE Talby was by order removed from *Cockfield* to *Boxstead;* and this order being appealed from, was confirmed at the sessions; but the sessions after that made an order of review, and quashed the former order of sessions,

because made by surprise. *Et per Cur.*, The order of review must be quashed; for the justices have no power after the first sessions.

20. DOMINUS REX *v.* HARDING.

[8 Will. 3. B. R.]

Sessions cannot refer a matter to be determined by another. Ante pl. 13. Post pl. 22. S.C. Sett. and Rem. 269.

A *CERTIORARI* was directed to the lord mayor and justices of peace of *London*, to remove an order, before filing whereof a *procedendo* was prayed: the fact was, the servant of one *Harding* complained to the sessions, that her master was in arrear to her for wages: on hearing the matter, both parties agreed to refer it to Sir *Thomas Lane*, late lord mayor, to be determined; which was done accordingly by order of sessions: He made an award or order, but before report made thereof, this *certiorari* was now brought, whereon a *procedendo* was now prayed. *Et per Cur.* A judge of *nisi prius*, by consent of parties, may make a rule to refer a cause, but the sessions cannot do so, though by consent (*a*): They may refer a thing to another to examine, and make report to them for their determination, but cannot refer a thing to be determined by the other; and therefore the *certiorari* was filed, and no *procedendo* granted.

(*a*) *Vide Stiles* 154. *Cald.* 30. 5 *T. R.* 279.

[478]

21. *Inter* THE INHABITANTS OF THE PARISH OF ST. MARY LE MORE *and* HEAVY-TREE *in* DEVONSHIRE.

Settlement by payment of parish rates. Vide post 523. pl. 1. and page 536. 1 Show. 12. Comb. 284, 410. Mod. Cases 38.

FACY was settled at *Heavy-Tree*, and afterwards went into the parish of *St. Mary le More* in *Exeter*, and took a house there of one pound *per annum*, wherein he lived a year and a half, and paid the rates and taxes due for the said house; and the justice at sessions held, that the rate for a house, without a rate on his person, was not sufficient to make a settlement (*a*); but the Court of King's Bench quashed this order for this cause, and held him settled at *St. Mary le More.*

(*a*) *Vide* 8 *Mod.* 38. *Bur. S. C.* 465, 73, 522, 627. *Cald.* 103, 276, 365. 2 *Const.* 233. *Per* Lord *Mansfield*, in *Rex* v. *St. Laurence, Cald.* 379. The occupier must be presumed to be rated against whom the first remedy lies, as between him and the public. *Per Cur. Rex* v. *Rainham*, 5 *T. R.* 240. The sessions must decide the fact, whether the rate is upon the landlord or the tenant.

22. DOMINUS REX v. BEARD.

AN order made by two justices of the peace in *Sussex*, adjudged *Beard* to be the father of a bastard-child, which was quashed, because it appeared thereby, that the examination of the woman was by one justice only, though the ordering part thereof was said to be made by both (*a*); and *Beard* was bound over to the next sessions.

Order of bastardy ill, because examination by one justice only. Ante pl. 8, 10, 18. Post. pl. 50. Post. pl. 34.

(*a*) *R.* *acc.* 6 *Mod.* 180. *Vide* 2 *Bl. Rep.* 1017. *And.* 238.

23. *Inter* INHABITAN. ST. GILES CRIPPLEGATE *and* HACKNEY.

[Pasch. 9 Will. 3 B. R.]

WHEREAS complaint has been made to us, that *Elizabeth Fulford*, wife of *Uriel Fulford*, is lately come into the parish of *St. Giles Cripplegate*, and is likely to become chargeable to the same; and whereas, on oath made by the said *Eliz. Fulford*, it appears that her husband was last legally settled at *Hackney;* these are therefore, *&c.* Quashed, because there is no judgment of the justices concerning the last legal settlement, but only the oath of the woman.

Place of last legal settlement must be adjudged. Vide ante pl. 7. post. pl. 26. and post. pa. 491, &c. ib. Comb. 413. Doug. 662.(637.) Str. 73.

24. DOMINUS REX v. BAREBAKER.

[Pasch. 9 Will. 3. B. R.]

ORDER upon *H.* adjudging him to be the father of a bastard-child, and ordering him to pay 3*s.* per week till the child attain the age of fourteen years, was held naught; for they have no authority but to indemnify the parish, by obliging him to maintain the child as long as it shall be chargeable to the parish (*a*).

To maintain his bastard till the age of fourteen, ill. 1 Mod. 20. 1 Vent. 210. 2 Keb. 23. Comb. 320, 321. S. C. Ante 121. Black. 234. Set. and Rem. 145.

(*a*) *R.* That order to pay till nine years old is good, 2 *Str.* 788.

25. ANONYMOUS. [479]

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Place of last legal settlement must be adjudged. Vide ante pl. 7. post. pl. 26. and post. pa. 491, &c. ib. Comb. 413. Doug. 662. (637.) Str. 73.

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ORDER upon *H.* adjudging him to be the father of a bastard-child, and ordering him to pay 3*s.* per week till the child attain the age of fourteen years, was held naught; for they have no authority but to indemnify the parish, by obliging him to maintain the child as long as it shall be chargeable to the parish (*a*).

To maintain his bastard till the age of fourteen, ill. 1 Mod. 20. 1 Vent. 210. 2 Keb. 23. Comb. 320, 321. S. C. Ante 121. Black. 234. Set. and Rem. 145.

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AN order made by two justices of the peace for settling a poor person, was quashed by the sessions; but because it did not appear that it came before them by way of ap-

Where the sessions quash an order, it must appear to be on

appeal. Ante pl. 13. 20. S. C. by the name of Jerrison's Case, Comb. 445. Set. and Rem. 176. Skin. 671. 5 Mod. 328. Cases B. R. 132.

peal, without which they have no jurisdiction, this order of sessions was quashed (*a*).

(*a*) *Vide Comb.* 133. *Bur. S. C.* 276.

26. *Inter* THE INHABITANTS OF BERRY *and* ARUNDEL.

[Pasch. 9 Will. 3. B. R.]

Want of adjudication of last legal settlement. Post 491, &c. Ib. & ante pl. 7. 5 Mod. 325, 397. Comb. 413 S. C. Set. and Rem. 257. Doug. 662. (637.) Str. 73.

WHEREAS complaint hath been made to us, that *Jacob Duckin* with his wife and children, came from his place of abode and last legal settlement in *Berry* to *Arundel*; we therefore require you, *&c.* naught; for there is no adjudication of the justices, which was his last legal settlement, but only a complaint, that *Berry* was, which doth not appear, whether true or false.

27. ELIZABETH ASHLEY'S *CASE.*

[Trin. 9 Will. 3. B. R.]

Return by the clerk of the peace, ill. Vide Pa. 431, 699, 701, S. C. 3 Salk. 258. Cases B. R. 138. Set. and Rem. 259.

TWO orders were removed by *certiorari*, but the return was quashed; because the return in the schedule annexed to the writ was not made by two justices, but by the clerk of the peace, who was not the person to whom the *certiorari* was directed, and thereupon a new *certiorari* was granted.

28. THE CASE OF CHESTERFIELD.

[Trin. 9 Will. 3. B. R.]

Covenant between the master and third person, the servant not being party, makes no apprenticeship. Post. 533. S. C. Skin. 671. 5 Mod. 308. Carth. 400. Comb. 445. Cases Br. 132. Vide Cald. 31.

JERRISON was a servant to Sir *Paul Jenkinson* in *Waltham:* afterwards he left his service and was put out, by his master Sir *Paul Jenkinson*, to a barber in *Chesterfield*, who was to teach him to shave and make periwigs, for which he was to have 5 *l.* from Sir *Paul*. *Jerrison* continued a year in this employment, according to covenants between Sir *Paul* and the barber, to which *Jerrison* was no party; and the Court adjudged that this did not make a settlement at *Chesterfield*, because it was no service; and that the said *Jerrison* was thereby no more than a boarder there for his education, which is no service to make a settlement.

29. DOMINUS REX *v.* BROWN.

[Trin. 9 Will. 3. B. R.]

AN order was made, adjudging *Brown* to be the father of a bastard-child, *May* 2, 1696: And in the *Michaelmas* sessions following the said order was discharged. Now both orders being here, the latter was quashed, because it did [*not*] appear thereupon, that *Michaelmas* sessions was the first sessions after notice given to the reputed father of his being so adjudged; for though 18 *Eliz.* appoints the appeal not to be to the first sessions after the order of the two justices, but the first [*general*] sessions after the party hath notice of the said order; yet by the statute of *H.* 5. there might be a sessions intervening, as in this case, between the order by the two justices and the order of sessions: and it must appear on the order that this was the first [*general*] sessions after notice had of the former order: After which the first order by the two justices was quashed, because there was an adjudication therein, that the reputed father should pay a certain sum weekly, till the child be of seven years of age; whereas they cannot charge the father for any certain determinate time, but as long as the child shall be chargeable to the parish.

Appeal from order of bastardy must be to the first sessions after notice to the father, of the first order. Ante, pl. 11, 16. Post pl. 34. Comb. 448. S. C.

2 H. 5. c. 4.

30. ELIZABETH ASHLEY'S *CASE.*

[Trin. 9 Will. 3 B. R.]

EXCEPTION was taken to an order of two justices, to remove, *&c.*, because it was not said that the two justices were of the division, according to 13 & 14 *Car.* 2. *Sed non allocatur;* for the Court held the statute as to this to be only *directory*, and not *restrictive* or *qualificatory*, as that of the *quorum* is.

Justices need not be said to be of the division. Ante, pl. 8. Comb. 285, 400. 5 Mod. 322.

31. *Inter* THE INHABITANTS OF DIMCHURCH *and* EASTCHURCH.

[Hill. 9 Will. 3. B. R.]

AN order was made at the quarter-sessions originally, setting forth, That whereas the parish of *Dimchurch* was overburdened with poor, and the parish of *Eastchurch* had no poor, the parish of *Dimchurch* should be annexed to the parish of *Eastchurch*, and that the occupiers of lands

Order for making one parish contributory to the poor of another. Comb. 242, 309. S. C. Set. and Rem.

221. Holt 573. 4 T. R. 778. 1 Str. 56. 2 Str. 1144. Comb. 309.

[481]

Skin. 258, 259.

5 Mod. 397.

there should contribute 20 *l. per annum*, by equal monthly payments to *Dimchurch*, as long as that was overburdened with poor, and *Eastchurch* had none: And it was objected by Mr. *Brewer*, that the justices of peace cannot alter parishes and annex one to another. 2dly, That the sessions cannot make an original order (*a*). *Per Holt*, C. J. There are two ways by 43 *Eliz.* to make one parish contributory to the poor of another parish, *viz.* either the justices may tax particular persons in aid to that parish which cannot relieve its own poor; or they may assess the whole parish in a certain sum, and leave it to the churchwardens and overseers to levy the same, or particular persons, which was well done in this particular case; but so much of it as concerns the annexing of the parishes is void, and the rest good. But the Court took time to advise.

(*a*) This was ruled, *Comb.* 25. 5 *Mod.* 397. *Foley* 32.

32. *Inter* INHABITAN. PAROCH. DOWNHEAD *and* BROADCHALK *in* WILTS.

[Hill. 9 Will. 3. B. R.]

After order confirmed on appeal, if the person goes to a parish not party, he must be removed by original order. Vide ante, pl. 13, 20, 25.

TWO justices of the peace made an order to remove *John Rainsford*, his wife and three children, from *Rowboborough* in *Somersetshire*, to *Broadchalk* in *Wilts*, which order, on an appeal to the quarter-sessions, was confirmed; after this *Rainsford*, with his wife and three children, came into the parish of *Downhead;* whereupon two justices, reciting the former order and confirmation, ordered him to *Broadchalk:* And now it was objected to this order, that it did not appear that one of the justices was of the *quorum*. Mr. *Northey* on the other side argued, it was not necessary here, because it was not an original order, but an order made in pursuance of an order of sessions. *Et per Cur.* A settlement, by order upon appeal, binds all parties: If the poor man goes to the parish from whence he is removed, the sessions must see their order obeyed; but if he goes to another parish not concerned in the appeal, then it is proper for two justices of the peace to remove him to the parish where he was settled by the sessions by original order; but then it must appear therein that one of them was of the *quorum* (*b*). Quashed.

(*b*) By stat. 26 *G.* 2. c. 27., this is no ground for reversing an order.

33. *Inter* INHABITAN. KING'S NORTON IN WIGORN *and* SWOLHILL *in* WARWIC'.

[Hill. 9 Will. 3. B. R.]

AN order was made to remove a poor woman from *Yarly* in *Worcestershire*, to *Swolhill* in *Warwickshire*; afterwards two justices in *Warwickshire* made an order to remove her to *King's Norton* in *Worcestershire*; whereupon two justices of *Worcestershire* sent her back to *Swolhill*; and upon an appeal to the sessions in *Warwickshire*, the justices confirmed her settlement at *King's Norton*, and then an order was made by two justices of the peace to execute the said order: All these orders being brought up by *certiorari*, *Carthew* moved to quash all except the first, all the others being made *coram non judice*; for when an original order is made, it binds all persons until it be set aside, and it cannot be set aside but on appeal to the sessions. Mr. *Northey*, on the other hand, insisted, that though in this case two justices could not send the woman back again to *Yarley*, yet they might send her back to a third place, as *King's Norton* is in this case; so that as to *King's Norton* it is but an original order; but the Court seemed to be of another opinion, for then *King's Norton* might send to *Yarley*, and there would be a perpetual circuity; but seeing in this case *King's Norton* had appeared at the sessions, and had been concluded there, they would not quash the order; and several questions arising, all was referred to a judge of assize.

Order of two justices binds against all parishes, till repealed. Vide post. pl. 49 and 52. 5 Mod. 416.

[482]

34. DOMINUS REX *v.* SHAW.

[Trin. 10 Will. 3. B. R.]

AN order was made by two justices of the peace, adjudging *Shaw* to be the reputed father of a bastard; whereupon he appealed to the next quarter-sessions of the peace, after notice, where the order of the two justices was discharged; and now it was here moved to quash the order of sessions, because by the statute the appeal must be to the next general sessions, and there might have been a general sessions before the general quarter-sessions, as in *London* and *Middlesex*, where there are four general sessions in a year, besides the general quarter-sessions (*a*). Quashed for this fault.

Appeal from order of bastardy must be to the general sessions. Ante, pl. 11, 16, & 29, & post. pl. 38. S. C. Carth. 455. Set. and Rem. 135. Cases B. R. 203.

(*a*) *R. cont.* 3 *T. R.* 496.; and said *per Curiam*, that this case does not appear to be one of the most accurate in *Salk. Reports*.

35. ANONYMOUS.

[Mich. 10 Will. 3. B. R.]

Order to remove A. and his family, ill for generality. Post. pl. 41. Faresl. 54. Comber. 478, 469. Post.

Vide Str. 114. Foley 278.

AN order made to remove three men and their families was quashed, *quia* too general; for some of their family might not be removeable. If a man settled at *A.* marries a poor woman who is settled at *B.*, and has children by a former husband; his wife shall be removed with him to *A.*, but her children, such of them as are above seven years old, shall not be removed; those under shall be removed, but that only for nurture; for they shall be kept at the charge of the other parish: But such a general order sweeps all away.

36. ANONYMOUS.

[Mich. 10 Will. 3. B. R.]

First order failing, all subsequent fall to the ground.

PER Northey, it was settled in the case of *Wooton-Basset*, that if the first order be naught, no subsequent order on an appeal can make it good. *Hill.* 11 *W.* 3. *B. R.* Same rule was taken by *Holt*, C. J. and both orders quashed; and *Trin.* 2 *Ann.* the same resolution between *Selon* and *Ripley.*

[483]

37. THE *CASE* OF THE PARISH OF ST. LEONARD SHOREDITCH.

[Mich. 10 Will. 3. B. R.]

On appeal from a poor's rate the sessions may quash the whole, and make, or other churchwardens, &c. to make a new rate. Vide ante 472. Faresly 10. Set. and Rem. 236. S. C. Holt 598. Carth. 464. Cases B. R. 211.

Carth. 58.

Vide 4 Bur. 1460. 5 Bur. 2634. Cowp.

THE churchwardens, *&c.* made a rate for relief of the poor, which was confirmed by two justices, and therein nothing was taxed for the personal estate, but all upon the real, which was erroneous. Several inhabitants appealed to the sessions, and the rate was there quashed; and the churchwardens, *&c.* ordered to make a new rate, upon both real and personal estates: In the new rate there was still a great inequality, the real estate being taxed ten times more, in proportion, than the personal estate; for this reason several inhabitants appealed again, and this rate was likewise vacated by order of the sessions. And now *Northey* and *Shower* moved to quash these orders, urging, that the sessions could only relieve particular persons over-rated or grieved, but could not set aside whole rates at once. *Sed per tot. Cur. viz. Holt*, *Rokeby*, and *Turton:* Surely the justices at sessions, upon an appeal of

particular persons grieved may, if they see cause, set aside the rate; for the act is, that if any person or persons find themselves aggrieved, it shall be lawful for the justices at the quarter-sessions to take such order therein, as by them shall be thought convenient. 43 *Eliz.* *c.* 2. *sect.* 6. And in neither of these cases, of the first or second rate, the justices could not have given relief without setting aside the whole rate, because the rate was burthensome to a whole set of men; and they may make a new rate themselves (*a*), or order the churchwardens and overseers to make a new rate, as was done in this case; they having it in their discretion to make a new rate at sessions, or remand it to the churchwardens, &c. to make one. The orders were confirmed (*b*).

326, 550. St. 17 G. 2. c. 38.

If sessions set aside a whole rate, they may make new one;

Or refer it back to the churchwardens, &c.

(*a*) The sessions cannot make an original rate, *Rex* v. *Aberford East*, 2 Ld. *Raym.* 798.

(*b*) Where an objection is against the general rule and proportion of the rate, the sessions, upon deciding in favour of the objection, should quash the rate, *Rex* v. *Sandwich, Doug.* 562. *Cald.* 105. Where the sessions hold a rate bad, because particular persons are not inserted, they must quash the rate, and cannot amend it, *Rex* v. *Maddem*, 1 *T. R.* 625. *Rex* v. *St. Agnes*, 3 *T. R.* 480. Where an appellant is overcharged, the sessions may relieve him by lessening his rate. *Rex* v. *Cheshunt*, 2 *T. R.* 623.

38. DOMINUS REX *v.* ALBERTSON.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 395. S. C.]

S. C. Carth. 469. Holt 507. Set. and Rem. 136.

AN order was made, reciting, Whereas it appears to us, two justices of the peace, that *Mary Spencer*, wife of *Jonathan Spencer*, mariner, was on the 20th of *March* 1695 delivered of a male bastard-child, which is likely to be chargeable, &c. And whereas it appears to us, that the said *Jonathan Spencer* was employed on board the ship called the *Pembroke*, in his majesty's service at *Cadiz*, and was not within the king's dominions when the said child was begotten, or born; and whereas it appears that *Albertson* had carnal knowledge of the body of the said woman, during the absence of her husband, and that he begat the said child; we therefore adjudge him to be the reputed father, and to pay weekly, &c. And the said order being confirmed upon appeal, was brought here by *certiorari*. And now *Shower* and *Upton* moved to quash these orders, because 18 *Eliz.* *c.* 3. gives the justices power only to meddle with bastards born *out of lawful matrimony*; so that though this child should be a bastard, yet the justices cannot meddle with it, because he is born *in lawful matrimony*: But it does not appear in this order that this child was a bastard; for it is only said the father was absent when the

Child born of a feme covert, the husband being at sea, from before the time of begetting to the birth, is a bastard; but that must appear in order. Vide ante, pl. 11, 16, 29, 34, &c. 5 Mod. 419.

[484]

child was begotten or born, in the disjunctive; also it doth not appear but the husband was in *England* during the time intermediate between the begetting and birth. *Per Cur'*, He is a bastard who is born of a man's wife while the husband, at and from the time of the begetting to the birth, is *extra quatuor maria:* In case of real action by him, the tenant may plead general bastardy; and on a writ to a bishop, he will certify him to be a bastard; being then a bastard as to discent, there is no reason why he should not be a bastard as to all other intents, and in particular a bastard within 18 *Eliz.* which is a remedial act: Also when a child is born in adultery, he is born out of the limits of *lawful matrimony*, the law then taking no notice of the husband; and so, though we must quash this order, because it does not appear that the husband was *extra quatuor maria*, during all the space of time intervening between the begetting and the birth, yet we hope care will be taken to make a new order without this fault (*a*). Quashed. But the defendant was bound over to appear at the sessions.

(*a*) Non-access may be proved, though both husband and wife are *infra quatuor maria*, *Str.* 925.; and an order of filiation made thereupon, *Str.* 1076. And it is not necessary that non-access should be proved by positive testimony, but it may be collected from circumstances. 4 *T. R.* 356.

39. THE CASE OF THE CHURCHWARDENS OF TOPSHAM.

[Hill. 10 Will. 3. B. R.]

Justices may make an order, that the last overseers pay the succeeding what remains in their hands. Vide post. 524, 525, 531, 533.

THREE justices took the account of the churchwardens, *&c.* of *Topsham*, for the year 1697, and adjudged that there was thereupon due from them to the parishioners of *Topsham*, 69*l.* 18*s.* 10*d.*, for the repayment whereof to the succeeding overseers for the year 1698, the justices made an order; to which it was excepted, that the justices had no power to make such order, but only to issue warrants to distrain; but the Court ruled the order to be well made, and confirmed the same.

40. DOMINUS REX *v.* GREGORY.

Wages. 5 Mod. 419. Set. and Rem. 232. S. C.

[485]

Vide ante 442. pl. 5. 3 T. R. 496. Str. 8.

AN order was made by the justices of peace for the defendant to pay 40*s.* for wages generally; and because it was not said for what wages, it was moved to quash it; for they can only settle wages in husbandry: But *per Cur.*, We will intend it for such wages, since the contrary does not appear.

41. THE *CASE* OF SYLVANUS JOHNSON.

THE justices of *Sussex*, on complaint that *J.* was come into the parish of *Brood*, in the said county, and was likely to become chargeable to the said parish, and adjudging *Sandherst* in *Kent* to be his last legal settlement, ordered that *Johnson*, and his wife and family, should be removed to *Sandherst;* which was quashed; because *non constat* what is meant by his family, and some of them may have a legal settlement at *Brood*, though *J.* had not.

To remove his wife and family, ill. Ante pl. 35. Vi. Far. 74. Comb. 478. Cases B. R. 553. S. C. Str. 114. Foley 278.

42. CHRIST'S HOSPITAL'S *CASE*.

[Trin. 11 Will. 3. B. R.]

A POOR child was left in *Christ's Church Hospital;* upon complaint of the wardens of the hospital, two justices made an order on the overseers of the poor of the parish, to receive and maintain the child; but this order was quashed, because it was not said, that the parents were unknown, or likely to become chargeable to the parish: For though a child of three months old be helpless, yet the parents are bound to provide for it. As to the principal matter which was hinted, *viz.* That the hospital was bound to provide for poor children there exposed, the Court thought there was nothing in that.

Poor children dropped in Christ Church Hospital. Set. and Rem. 53. S. C.

43. *Inter* THE INHABITANTS OF ST. NICHOLAS, GUILFORD *in* SURREY, *and* KILLINGTON *in* SUSSEX.

[Trin. 11 Will. 3. B. R.]

NORTHEY moved to quash an order of two justices to remove a woman and her bastard-child from *A.* to *B.*, whereas it appeared in the order that the child was born at *C.* *Holt*, C. J. The bastard must be kept where it is born (*a*).

Bastard settled where born. Vide ante 427, 428. Post. 528, 532. Holt 509. S. C.

(*a*) Though bastards are settled where born, they must be removed with or to the mother for nurture, while under seven years old, 2 *Sess. Cas.* 89. And an order may be made on the parish where they are settled, to pay money for their support and maintenance to that where they reside for nurture, *Cald.* 6. *Vide Doug.* 9.

44. *Inter* THE INHABITANTS OF THE PRECINCT OF BRIDEWELL *and* THE PARISH OF CLERKENWELL.

[Hill. 11 Will. 3. B. R.]

Carth. 515. S. C. Holt 575, 509. Justices have no jurisdiction to remove poor persons to or from extraparochial places. But note: In the case of The Inhabitants of Stokelane and Dolting, Hill. 11 Ann. B. R. it was adjudged by Parker, C. J. and the whole Court, that by virtue of 13 & 14 Car. 2. cap. 12. sec. 21. the justices may exercise the powers given by 43 El. and that act, in all extraparochial places, containing more houses than one, so as to come under the denomination of a vill or township. Post. pl. 48. Vide post. 487, 501. 2 Lev. 142, 143. 4 Mod. 157 158. 1 Mod. 251. 2 Mod. 237.

A SPECIAL order of sessions was, That *H.* was bound apprentice, and served seven years to a hemp-dresser, within the precincts of *Bridewell*, and afterwards he lived nine years in *Clerkenwell* parish, but gained no settlement there: The justices sent him to *Bridewell* as his last legal settlement, by an order which set forth *Bridewell* to be an extraparochial place. *Et per Holt*, C. J. If a place is extraparochial, and has not the face of a parish, the justices have no authority to send any man thither; and so it was resolved in the case of Sir *John Osborn*: Possibly a place extraparochial may be taxed in aid of a parish, but a parish shall not in aid of that. This is *casus omissus*. This order was quashed.

45. *Inter* THE INHABITANTS OF ST. MICHAEL BEDENHAM *and* KINGSTON-BOWSEY.

[Hill. 11 Will. 3. B. R.]

Order of reversal on appeal binds not a third parish, nor party. Post. pl. 58. & pag. 524, 527. Ante, pl. 11, 13, 20, 25. Carth. 516. S. C. Set. and Rem. 275.

H. WAS sent by order of two justices from *St. Michael Bedenham* to *Kingston-Bowsey*, and that order was reversed upon an appeal to the sessions: Then the man went to *Bedenham*, and *Bedenham* sent him to *D.*; and a motion was made to quash this order, because the order of reversal upon the appeal as to *Kingston-Bowsey* was conclusive against all the world. But the Court held, That the determination upon the appeal between other parties ought not to bind as to a third parish which was no party (*a*).

(*a*) *Vide acc. Bur. S. C.* 17, 425.

46. ANONYMOUS.

[Hill. 11 W. 3. B. R.]

Special order ought not to conclude to the opinion of the Court.

AN order of sessions drawn up specially, in order to have the opinion of the Court, was concluded; *and if the Court should be of opinion, then, &c.*, which was held

naught; for the justices ought to determine one way or other, and not make a special conclusion, referring to the Court; but it was referred to the judge of assize.

47. *Inter* INHABITAN. PAROCH. EATON-BRIDGE *and* INHABITAN. PAROCH. WESTRAM *in* KANC. [487]

[Hill. 11 W. 3. B. R.]

AN order was made at the quarter-sessions for the relief of poor prisoners in gaols, and providing materials to set them at work, upon the statutes of 14 *Eliz.* c. 5. and 19 *Car.* 2. c. 4., whereby a sum was assessed on the several parishes, not exceeding what is allowed by both acts; but the order was quashed, because they ought to have made distinct orders upon the different statutes, the money to be levied by virtue of each statute being applicable to different purposes (*a*). Poor prisoners.

(*a*) The stat. of *Eliz.* is the general act for parochial relief. The stat. of *Cha.* is for the relief of persons in gaol, by a charge on the county.

48. *Inter* THE INHABITANTS OF THE FOREST OF DEAN *and* THE PARISH OF LINTON.

[Trin. 12 W. 3. B. R. S. C. Foley 97.]

H. LIVED ten years in the forest of *Dean*, and then died, and left several children: Two justices made an order to remove them to *Linton* in *Herefordshire*. *Et per Holt*, C. J. If a place be a reputed parish, and have churchwardens and overseers of the poor, it is within 43 *Eliz.* though in truth it be no parish; but if it be merely extraparochial, as the justices cannot send to such a place, so they cannot send from it: As it is exempt from receiving, so it shall not have the benefit of removing, for they have not proper persons to complain. Persons in extraparochial places must subsist on private charity, as all persons did at common before 43 *Eliz.* which enacts, That every parish shall keep their own poor; in consequence of which the jurisdiction of removals was first set up before the statute 14 *Car.* 2. For, unless the poor were removed to their own parishes, every parish could not maintain their own poor. But the statute of 43 *Eliz.* does extend to extraparochial places. *Gould*, J. started a question, If the justices of the county, where the parish wherein he was last legally settled lies, might not make an

Extraparochial places. Vide ante, pl. 44. Holt 575. S. C.

order upon the parish to make a rate for the relief of this poor man in the extraparochial place, because not having gained a settlement there, he remains an inhabitant of that parish still, else the man may be starved for want of relief? *Holt*, C. J. Quash this order, and then go and get an order: Forasmuch as *H.* was settled in the parish of *Linton*, and is not able to provide for himself: These are, *&c.*

[488] 49. *Inter* THE INHABITANTS OF CHALBURY *and* CHIPPING-FARRINGDON.

[Trin. 12 Will. 3. B. R.]

Parish, upon whom an original order is made, cannot remove till that be reversed. Vide ante, pl. 33. Post. pl. 52. Holt 509. S. C.

H. WAS removed by order of two justices, from the parish of *A.* in *Warwickshire*, to *Chalbury* in *Oxfordshire;* from thence, by order of two justices, to *Chipping-Farringdon* in *Berkshire*. It was objected, That *Chalbury* ought to have appealed, and got the order upon them discharged, which *Holt*, C. J. agreed; for sending the poor man to another place, is falsifying the first order, which cannot be done but by appeal; for the order of two justices is a determination of the right against all persons, till it be reversed: *Chalbury* should have appealed from the *Warwickshire* order, and got that set aside, and sent the man back thither, and the justices there should have sent him to *Chipping-Farringdon;* therefore naught.

50. *Inter* THE INHABITANTS OF WARE *and* STANSTEAD-MOUNT-FITCHET.

[Trin. 12 Will. 3. B. R.]

AN order was made by two justices, to remove *H.* with his wife and children, from *Ware* in the county of *Essex* to *Stanstead* in the same county. Exception was taken to this by Mr. *Eyre*, 1st, Because it was, with wife and children. 2dly, Because it was said, *It appears upon examination before us, or one of* us, *&c.;* and the examination ought to be before both, because both are to make the judgment of removal. Mr. *Cowper* would have distinguished this as the first exception from the case of *Mich.* 10 *Will.* 3. *ante*, *pl.* 35, 41. Of his wife and family, because he might have servants not removeable, but children ought to follow their parents. To the second he said, That by 14 *Car.* 2. *c.* 12. the complaint is directed to be made to any justice, and in consequence one justice may

Examination must be by both justices. See 6 Mod. 180.

examine; and it was only necessary that two should join in removing: *Sed Cur. contra* in both. To the first *Holt*, C. J. said, suppose *H.* had put his son out to service at sixteen years old at *B.*, and accordingly he had served there a year, and after the father comes to live at *B.* himself, and the son to live with him; such an order would remove the son, though he be not removeable. To the second, *Gould*, J. said, The statute directed, and the practice was, to make complaint to one justice, and he grants his warrant to bring the poor man before two justices, and then they two examine and remove (*a*).

Faresl. 54. Ante, pl. 22.

(*a*) *Vide* 2 *Str.* 1092. *Bur. S. C.* 136. 2 *Bott.* 3d edit. 769. 3 *T. R.* 707.

51. DOMINUS REX *v.* THE INHABITANTS OF LONG-CRITCHELL. [489]

[Mich. 12 Will. 3. B. R.]

A MAN was removed from the parish of *Allhallows* to the parish of *Long-Critchell*. He goes from *Long-Critchell* to *P.*; they got several orders from two justices, by way of execution of the first order, to remove him from *P.* to *L.* But all of them were quashed, because *P.* ought to have made an original complaint, and upon that have got an order, and not have grafted on the order of removal from *A.* to *L.*, though they might have used that as evidence to induce the justices to make such original order; for *P.* is a third parish, against which *L.* is not (*b*) bound by the order of removal from *A.* to *L.*, but may contest the right of settlement with them. Mr. *Upton* took an exception, that the enforcing orders did not appear to be made by two justices, *quorum unus:* And *Holt*, C. J. seemed to think that a good exception, because such persons as cannot make an order, cannot execute it: But the orders were quashed upon the first reason.

Order of execution, Cases B. R. 419. S. C. Holt 510.

See 5 Mod. 321, 322. Ante 473, 480, 488. Ante 436. pl. 18. & Post. pl. 60.

(*b*) The contrary is clearly law, as is held in the next succeeding case. It was acknowledged, 3 *Bur.* 551., as a settled point, that an order of removal to a parish confirmed, or without appeal, concludes that parish against all the world. The same is held, 2 *T. R.* 598.; but the decision in this case may be, and (*come semble*) is good; though the reason to which this annotation is applied is false.

52. *Inter* THE INHABITANTS OF THACKHAM *and* FINDON *in* SUSSEX.

[Hill. 12 Will. 3. B. R.]

Two justices order not appealed from binds the whole parish upon which it is made, till a new settlement is gained. Vide ante, pl. 33 & 49.

Vide note to preceding case.

A POOR person was removed in 1694 from *West-Starring* to *Findon; Findon* does not appeal. In 1700 the man comes to *Thackham*, and *Thackham* sends him by order of two justices to *Findon: Findon* appeals, and the order was discharged. All three being now brought up by *certiorari*, it was moved to quash the order made upon appeal, and urged that *Findon* was bound by the first order from *West-Starring* to them, from which they never appealed, with respect to all the world, and are concluded to say, that the place of his last legal settlement was not with them: But in respect of the distance of time, the Court could not tell but he might have gained a new settlement at *Thackham*, and that might appear to the justices, and they might have good ground to discharge the order of the two justices. Then the counsel offered to produce an affidavit, that there was no new settlement proved; that the Court held that they could not examine that by affidavit, nor inquire thereby into the reason of making the order (*a*). *Ex motione* Mr. *Shelly*.

(*a*) *Vide* 2 *Bott*, 3d edit. 860. 2 *Bur. S. C.* 394.

[490]

53. DITTON'S *CASE*.

Vide Post. 491. 1 Salk. 67, 68.

[Pasch. 13 Will. 3. B. R.]

Order for discharging an apprentice, the master not appearing. Vide Fares. 55. 1 Mod. 2. 5 Mod. 139, 140. Rep. B. R. Temp. Hard. 101.

MOVED to quash an order made for the discharge of an apprentice: The question arose upon the clause of the statute, which directs, That upon the appearance of the master the apprentice may be discharged by four justices, after the next justice hath endeavoured to compose the matter in difference. In this case it was objected, that *Ditton* the master was bound over to appear, and did not; and the justices have but a limited jurisdiction; and it is expressly directed by the act, that this discharge is to be made on the appearance of the master; besides, there is another remedy to proceed on the recognizance, which is forfeited by not appearing.

Per Cur. The act must have a reasonable construction, so as not to permit the master to take the advantage of his own obstinacy; and it would be very hard, that supposing the master is profligate and runs away, the apprentice shall never be discharged. Afterwards exception was taken,

because it appeared upon the face of the order, that *Dutton* was a collar-maker, & *non constat* what the trade is, nor that it is within the statute; like *Comfort's* case, where one was bound to a mantua-maker, when there was no such trade within the statute, nor at the time of the statute (*a*): And in this case it was said, that the justices might make the master make restitution of part of the money, and that it hath been so adjudged.

Ante, 67, 471.

1 Saund. 313, &c. Post. 491. Skin. 108.

(*a*) This is now clearly immaterial, *Str.* 663. 1 *Bott*, 3d ed. 515.

54. *Inter* THE INHABITANTS OF WATFORD *and* WENDOVER.

[Pasch. 13 Will. 3. B. R.]

Appeal from order of corporation justices, must be to the sessions of the county, not of the corporation.

TWO justices of St. *Albans* made an order, that whereas they were credibly informed, that *Wendover* was the place of *H's.* last legal settlement, but no where adjudged it to be so; from this order there was an appeal to the quarter-sessions of St. *Albans*, where it was confirmed; and both were quashed; the first, because there was no adjudication of what was the place of his last legal settlement; and the second, because the appeal ought to have been to the sessions of the county, not of the corporation; and as it was, it was *coram non judice*.

55. *Inter* THE INHABITANTS OF SUDDLECOMB *and* BURWASH. [491]

[Trin. 13 Will. 3. B. R.]

Complaint that H. is likely to be chargeable, not enough without adjudication; but, Whereas it appears to us, on complaint, &c. that H. is likely, &c. is sufficient. Ante 473, 478, 479. Post. 553. 1 Sid. 99. 1 Lev. 84. Raym. 65. 1 Show. 76. 3 Mod. 270. 5 Mod. 357. S. C. 6 Mod. 163, 164. Holt 576. Doug. 662.

EXCEPTION was taken to an order of two justices, because it was only said to be complained by the church-wardens, that the person removed was likely to become chargeable, but not adjudged so by the justices. *Holt*, C. J. said, That the justices cannot remove a man, unless he be likely to become chargeable, for otherwise they might remove a man of an estate; and he took a diversity, that where the order is, *Whereas it appears to us*, &c. *on the complaint*, &c. *that* J. S. *is likely to become chargeable to the parish*, that will be well enough; but where it is, as here, *Whereas complaint has been made*, &c. that is ill: But it was agreed to be referred to the judge of assize. *Postea, Pasch.* 2 *Ann. B. R.* The case of the Inhabitants of *Darnell* in *Cheshire*, the same resolution. *Postea, Pasch.* 2 *Ann. B. R.* the same resolution. It ought to appear, that the person removed, is a person removeable, and

(637.) Set. and Rem. 21, 38. 1 Str. 77, 527.

there ought to be a particular averment, that he is likely to become chargeable.

56. DOMINUS REX v. JOHNSON.

[Trin. 13 W. 3. B. R.]

Sessions may make original order to discharge apprentice. See 1 Salk. 67, 68 S. C. 1 Mod. 2, 287. 1 Saund. 314, 316. 1 Vent. 174, 175. Rep. B. R. Temp. Hard. 101. Str. 143, 704.

THE justices of peace at *Newcastle* in *Northumberland* discharged an apprentice by an original order made at the sessions, without any previous application to a justice of the peace to endeavour to compromise the matter, as the statute directs; and after several debates it was adjudged, that if this had been a new thing, the Court would have thought a previous application to a justice necessary; but there having been so many original orders made at sessions brought into this court, and confirmed here, it was too late to call this matter in question; so the order was confirmed.

57. MINCHAMP'S CASE.

[Trin. 13 Will. 3. B. R.]

Justices at sessions are proper judges, whether fit to oblige H. to take an apprentice, or not. Vide 6 Mod. 163, 164. 1 Salk. 66, 68, 381. 6 Mod. 164. 1 Show. 76. 3 Mod. 270. Raym. 65. 1 Lev. 84. 5 Mod. 139, 140. 1 Saund. 314, 316.

HE being a merchant at *Mile-End*, two justices bound a poor girl an apprentice to him; he appealed to the sessions, and the order was discharged; because they thought it unfit to compel a merchant to take an appentice; and now this Court, on consideration of the matter, confirmed the order of sessions; because the late act having made persons compellable to take apprentices, and given an appeal to the sessions, it was in the discretion of the justices at sessions to determine, * whether it was or was not fitting to put an apprentice upon any one; and therefore the Court would not disturb what the sessions had done, but confirmed the order.

[* 492]

58. *Inter* THE PARISHES OF SWANSCOMB *and* SHENSFIELD.

[Pasch. 1 Ann. B. R.]

Order reversed is final only between the parties: Order confirmed, or not appealed from, is final as to all the world. Ante,

A POOR man was sent by two justices to *Shensfield*, and upon an appeal the order was confirmed; afterwards *Shensfield* sends him by an order to *Swanscomb*: All these orders being brought up by *certiorari*, the order to send him to *Swanscomb* was quashed, because, by the determination of the justices in affirmance of the order on

the appeal, *Shensfield* was estopped against all the world to say, That was not the place of his last legal settlement; for the justices cannot remove, but to the place of the last legal settlement; and shewing any later place of settlement will discharge the order on the appeal; and the diversity is between an order discharged and an order confirmed upon appeal, or not appealed from. In the first case, the matter is at large as to all places, but the place to which the poor man was sent, which, upon the appeal, was determined not to be the place of his last legal settlement. But in the latter cases, the place to which he was sent is bound, and the order final and conclusive as to all the world.

pl. 45. 1 Vent. 310. 5 Mod. 417. 6 Mod. 269, 287.

Post. 524, 527. 18 Vin. Ab. 468. Bur. S. C. 17, 551, 425. Cald. 59.

59. *Inter* THE INHABITAN. OF WESTON-RIVERS *and* ST. PETER'S IN MARLBOROUGH.

S.C. 5 Mod. 149. called Rex ver. Inhab. of Wooton-Rivers.

UPON an order of two justices, it was objected, 1st, That it was not said that the woman was poor, *&c.*, but lame, and like to become poor. 2dly, That it was not said she did not offer security. 3dly, That it was said to be upon complaint only, and not of the churchwardens, *&c.* 4thly, It was not said she rented not a tenement of 10 *l. per annum.* The two last were the objections chiefly insisted upon; and the Court was clear as to the first of these two, *viz.* that it must be upon complaint of the churchwardens, *&c.*, and so appear; but, upon reading the return, another question arose; for the return set forth at large, that upon complaint of the churchwardens and overseers of the poor concerning *A.* to the justices, they the said justices, one of the *quorum*, made the following order *in hæc verba: Forasmuch as complaint hath been made to us, &c.*, so that it was urged, that the defect of the order was supplied by the return of the *certiorari.* As to the last of the four exceptions, *Holt*, C. J. said, that before 13 *Car.* 2. two justices *removed by consequence of law, upon 43 *Eliz.*, because that statute makes a provision, that every parish shall maintain its own poor; therefore the justices considered who were properly the poor of a parish, and they were held to be such as were there settled a convenient time, which was thought a month, so that a month's abode made an inhabitant. Still there remained several doubts, which occasioned 13 *&* 14 *Car.* 2. *c.* 12., upon which statute the present question arises, *viz.* Whether the power to remove be not founded on 13 *&* 14 *Car.* 2., but on the law, as it was before? And since such an order would serve to remove before, why will it not serve now, since the statute? Or whether 13 *&* 14 *Car.* 2. obliges the

It is necessary to shew in a removal order that it was made upon complaint of the churchwardens, &c., but not that the party did not rent a tenement of 10 l. per annum. Vide ante 491. post. 524, 538. Farcsl. 54. Mod. Cases 88. S. C. Carth. 365. Holt 510. 3 Salk. 254. Set. and Rem. 18, 165. Cases B. R. 89.

Defect of an order not made good by matter alleged in the return.

[* 493]

justices to alter the form of their order? And this depends upon this part of the statute, *viz.* Whether it be by way of giving jurisdiction or restriction. At another day, *Holt*, C. J. pronounced judgment; as to the exception to the not averring that she did not rent a tenement of 10 *l. per annum*, he said, the secondary had searched the precedents, and they are without this clause, according to the form of the orders before 14 *Car.* 2. And this order therefore is well enough; and if the party rents a tenement of 10 *l. per annum*, he may appeal to the sessions. As to the other exception, it is fatal (*a*), for no one can disturb a man coming into a parish, but they that have authority to do it. A complaint *ex officio* from one not concerned is nothing, it may be the parish are willing to keep him; and as to the return, that cannot cure the order, for they had exercised their authority before; and by the *certiorari* they have no power but to return the order *in hæc verba;* and therefore what they think fit to return farther the Court can take no notice of.

On certiorari justices can only return the order in hæc verba. Vide 1 Salk. 147.

(*a*) *Vide Foley* 267. *Set. & Rem.* 35. *Bur. S. C.* 24. *And.* 361.

60. *Inter* THE INHABITANTS OF ST. GEORGE'S *and* ST. OLAVE'S, SOUTHWARK.

Justice cannot command the officers of the parish whither H. is sent to remove him. Vide ante 436. pl. 18, & 489, pl. 51. Comb. 325. Carth. 449.

TWO orders were returned, the first for settling a poor man, one *Thomas Gill*, and the second a confirmation of the first, upon an appeal to the quarter-sessions: The first order recited, *That whereas complaint hath been made to us*, &c., *that* T. G. *had of late intruded into the parish of* St. George's, *we adjudge him to be last legally settled at* St. Olave's: *These are therefore to require you to convey the said* Tho. Gill *to the parish of* St. Olave's; and the direction upon the order was, *To the churchwardens aad overseers of the poor of the parish of* St. Olave's: Quashed; for they ought, and can only order the parish-officers where the intrusion is made, to make the removal.

[494]

61. *Inter* THE PARISHES OF ST. ANDREW'S HOLBORN, *and* ST. CLEMENT'S DANES.

[Mich. 3 Ann. B. R.]

Sessions being but one day in law, may alter their judgment and make a new

THE Court of quarter-sessions of *Middlesex* made an order, and afterwards the same sessions vacated it by a subsequent order; and a *certiorari* being brought, both orders were returned thereon. *Et per Holt*, C. J. You

should not have returned the vacated order, but only the latter. This is as if we, disliking our judgment, should the same term make an entry of two different judgments, and return both upon a writ of error, which ought not to be: The sessions is all one day, and the justices may alter their judgment at any time, while it continues: Thus, at the *Old Bailey*, you see judgment *de pain fort & dure* given; and yet, if the party will plead, we will set aside that judgment, and admit him to plead.

order; but must certify the latter only. Vide 6 Mod. 287. Post. 605, 606. 5 Mod. 336 S. C. Post. 606. Sett. and Rem. 168. Holt 511. Cumb. 66, 353.

OUTLAWRY.

1. REX & REGINA *v.* TIPPIN.

1 Show. 80, 309. 2 Show. 60, 68.

[---- 1 W. & M. B. R.]

ONE was outlawed upon an information for seducing a young gentleman to marry a young woman of a lewd character, and fined 5000*l.* And it was moved in behalf of the defendant, that he could not be fined upon the outlawry, because in misdemeanor the outlawry does not enure as a conviction for the offence, as it does in cases of treason and felony; but as a conviction of the contempt for not answering, which contempt is punished by the forfeiture of his goods and chattels; and if he might be fined now, he must be fined again upon the principal judgment. And the first was held to be irregular, for the outlawry in these cases is not a conviction, as appears by *Fleta* 42. *Quamvis quis pro contumacia & fuga utlagetur, non propter hoc convictus est de facto principali.*

H. outlawed for misdemeanor, cannot be thereon fined for the fact. See 1 Lev. 33, 34. 2 Lev. 49. Raym 17. 2 Chan. Cas. 44. Carth. 384. Cumb. 456. 5 Mod. 221. 7 Mod. 39. 8 Mod. 177, 8.

2. ATTORNEY GENERAL *v.* BADEN. [495]

[Mich. 5 W. & M.]

A. OWES money to *B.* on a judgment, and to *C.* on a bond; *A.* is outlawed at the suit of the obligee, and his lands seized on the outlawry; and the question was, Whether the conusee of the judgment could extend these lands? And it was held the outlawry should be preferred, and that the king's hands should not be amoved, unless the conusee could shew covin and practice between the obligor and obligee.

Vide Ray. 17. 1 Lev. 33, 34. 2 Lev. 49. Ca. Parl. 75. Hard. 106.

3. ADLAME v. COLEBATCH.

[Pasch. 8 Will. 3. C. B.]

Where the plaintiff shall reverse it at his own charge. 2 Vent. 46.

IT was moved in *C. B.* that the plaintiff might reverse an outlawry at his own charge, upon affidavit, that the defendant was actually in the *Fleet* in execution for the plaintiff in another suit, and he knew it; and it was granted, because the plaintiff should have brought him to the bar by *habeas corpus*, and there have charged him with a new declaration (*a*).

(*a*) *Vide Rep. B. R. Temp. Hard.* 123.

4. LEE v. MILLARD.

[Mich. 8 Will. 3. C. B.]

Note; The law is now altered in this particular, by stat. 4 & 5 W. & M. c. 18. Vide post. pl. 6. See 2 Lev. 464. Cro. El. 170, 373. Vi. Barnes 324.

A LIKE motion was made upon affidavit, that the defendant lived publicly, and was denied. *Et per Powell*, J. Such motions are frequently granted in *B. R.*, because it is a great charge to reverse an outlawry there; for the defendant must appear in person, but here he needs not, and the charge is but 16*s*. 8*d*., not so much as a bailiff's fees for an arrest. We have always denied this motion of late. 2 *Ven*. 46.

5. ARTHUR'S *CASE*.

[Hill. 8 Will. 3. B. R.]

Error to reverse outlawry for felony; if there be lands there must go a scire facias [*against all the tertenants and lords, mediate & immediate*, 2 Hawk. c. 50. sect. 13.] but if attorney-general confess on record that there are none, no scire facias is necessary. S. C. Holt 518. Vi. 1 And. 188.

ARTHUR was outlawed for felony upon five indictments, and afterwards came in, and was brought to the bar, and asked what he had to say why judgment should not be given? He produced five writs of error. *Et per Holt*, C. J. If there be no lands, the attorney-general may confess error, and then he shall plead presently, and be tried upon the indictment. If there be lands, there must be a *scire facias* against the lords, mediate and immediate, to shew cause why he should not have restitution. But if it be suggested on the roll that he has no lands, and the attorney-general confesses it, there needs no *scire facias*.

*** A *scire facias* must be into all counties where the criminal has lands, 3 *Keb*. 29. But not in outlawry for treason, 2 *Hawk*. c. 50. sect. 13.

6. ANONYMOUS.

[Mich. 10 Will. 3. B. R.]

H. WAS outlawed in two actions, one was 10*l.* the other for 40*s.*; and, upon reversing the outlawry, the Court took special bail for the first, and an appearance for the other, upon 4 & 5 *W.* & *M.* *c.* 18. *Note;* The recognizance was taken pursuant to 31 *Eliz.* *c.* 3. *Note;* Now *per* 4 & 5 *W.* & *M.* one outlawed, except for treason or felony, need not appear in person to reverse an outlawry, but by attorney.

Defendant need not appear in person to reverse outlawry, except in treason or felony. Vide ante, pl. 4. Sty. 297, 495. Carth. 7. 1 Wilson 3. 2 Stra. 1178.

7. SYMMONS *v.* BINGOE *and* COOK.

[Pasch. 4 Ann. B. R.]

THE defendant *Bingoe* being a feme, and waived upon process of outlawry, it was now moved on her behalf, that upon filing common bail, she might have liberty to reverse the outlawry. *Per Cur.* The writ of error to reverse the outlawry must be brought in the name of both the parties that are outlawed; and if one only appears, the other may be summoned and severed, and then the outlawry may be reversed for the benefit of him who appears only. Before it can be reversed for want of proclamations, the party outlawed must give bail to appear, and to answer in another action.

If two are outlawed, error to reverse must be brought in the name of both, but one may be summoned and severed. Cro. El. 270, 278.

31 Eliz. c. 3.

If the party outlawed comes in *gratis* upon the return of the exigent, *alias* or *pluries*, he may be admitted by motion, to reverse the outlawry, for any other cause, but want of proclamations, without putting in bail. If he comes in by *cepi corpus*, then he shall not be admitted to reverse the outlawry, without appearing in person, as in such case he was obliged to do at common law; or putting in bail with the sheriff for his appearance upon the return of the *cepi corpus*, and for doing what the Court shall order. Appearing by attorney is an indulgence by 4 & 5 *W.* & *M.*, and the bail is to be special or common in this as in other cases (*a*).

If H. comes in gratis, he may reverse without bail; otherwise, if by cepi corpus. Cro. El. 707.

Of pleading outlawries in bar or abatement, vide Cro. Car. 566. 3 Lev. 29. 1 Show. 8. *And how to plead an outlawry before or after judgment, see* 1 Lutw. 110, 111. *And how to plead it in the same court, and how in another,* 1 Lutw. 40. 2 Lev. 50.

(*a*) *R. acc.* *Sercole* v. *Hanson,* 1 *Wils.* 3, 2 *Str.* 1178. *Cracraft* v. *Gledowe,* 3 *Bur.* 1482. *Campbell* v. *Daley,* 3 *Bur.* 1920. *Vide Barnes* 326.

Vide post. 658, 701. Lutw. 1643. 2 Lev. 142. 1 Saund. Hob. 217. Faresl. 9 & 38. 6 Mod. 28.

OYER AND SHEWING OF DEEDS, WRITS, &c.

1. SALISBURY *v.* WILLIAMS.

[Mich. 4 W. & M. B. R.]

Want of profert, only form. Vide stat. 4. 5 Anne, c. 16.

IN debt on a bond in the grand sessions of *Wales*, the plaintiff omitted in his declaration to make a *profert*, *&c.* Judgment was for the plaintiff; and now in error this omission was insisted on, and the Court held it only matter of form, of which no advantage could be taken after verdict, or on a general demurrer, and therefore affirmed the judgment. *Sid.* 249. *Cro. Car.* 190. *Cro. El.* 153. 217. 16 *&* 17 *Car.* 2 *cap.* 8.

2. MORRIS'S *CASE.*

[Tri. 7 Will. 3. B. R.]

Upon profert made unnecessarily, oyer shall not be given. Vide 6 Mod. 28. 3 Lev. 50.

IN *replevin*, the defendant avowed for a rent-charge, and made title by a will, and pleaded it with a *profert*, and the plaintiff insisted to have *oyer*, alleging it was the avowant's folly to make a *profert* of it, and he ought to take advantage of it. *Et per Cur.* He was not bound to plead it so; it is but surplusage, and we will not compel him to give *oyer* of it.

3. ROBERTS *v.* ARTHUR.

[Mich. 13 Will. 3. B. R.]

Deed remains in Court all the term it is produced; otherwise, of letters testamentary or of administration. S. C. Cases B. R. 598. Holt 421. Where patents must be shewn, & where not. Mod. Cases 233. 5 Co. 76. 2 Lev. 142. Faresl. 9, 38. Lutw. 1644.

UPON the *profert* of a deed it remains in court all that term, but no longer, unless it be controverted; but letters testamentary, or of administration, do not remain in court; for the party may have occasion to produce them elsewhere. *Vide* 36. *H.* 6. 30. *Per Cur.*

Where the letters patent pleaded, are recorded in the same court where the plea is pleaded, the party need not shew them; but where in another court, he must plead them with a *profert in Cur.*, or the exemplification of them under the great seal. *Per Holt*, C. J.

4. LONGAVIL *v.* THE HUNDRED OF ISLEWORTH.

S. C. 6 Mod. 27, 28. Holt 518.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 969. S. C.]

IN debt against the hundred of *Isleworth;* the defendant pleaded in abatement *caption del robbers, &c.*, the plaintiff replied *nul caption, &c.*, upon which it was demurred, and a *respondeas ouster* awarded; and now all being the same term, the defendant craved *oyer* of the writ, and that being set forth, pleaded the general issue. *Et per Holt*, C. J. To deny *oyer* where it ought to be granted is error, but not *e contra;* Therefore we ought either to grant or to enter the denial upon record, that they may assign it for error. If the plaintiff will contest it, he may strike out the rest of the pleading, and demur, in order to obstruct the *oyer:* And at another day it was ruled, that the defendant could not have *oyer*, because he had already pleaded in abatement, and having *oyer* is never to enable the party to plead in bar, but to plead to the writ, which is done already, and therefore past.

Denial of oyer where it ought to be granted, is error, otherwise of granting it, where it ought not. 6 Mod. 28, 292.

Vide Doug. 227. (215.) 1 T. R. 150.

5. ARMIT *v.* BREAM.

S.C. 6 Mod. 244. Holt 212. 1 Salk. 76, ante 425.

[Mich. 3 Ann. B. R.]

WHERE a man has obliged himself to make a deed, and is sued for not doing it, it is not enough to say, that he made the deed, *viz.* lease, bond, *&c.*, but he must set it forth, that the Court may judge of its sufficiency; for it ought to be a good deed; but if it be to deliver, or shew, or produce a deed; that is, a deed already made, there it is enough to say, that he delivered, or shewed, or produced it. *Per Holt*, C. J.

Where H. is bound to make a deed he must set it forth; otherwise where to shew, deliver, and produce it only. Vide Yelv. 111.

6. COOK *v.* REMMINGTON.

S. C. 6 Mod. 237.

[Mich. 3 Ann. B. R.]

IN *debt* upon a bond, the defendant demanded *oyer* of the condition, which was, to perform covenants in an indenture, and then demanded *oyer* of the indenture; and the plaintiff gave it him, omitting an indorsement, which was made before the execution of the deed; upon this *oyer* the defendant pleaded performance; the plaintiff replied and set forth the indorsement, and prayed judgment for the variance. *Sed per Cur.*, 1st, The defendant should have set forth the indenture himself, being a party to it,

Defendant demands oyer of an indenture, which he ought to set forth himself, and the plaintiff gives oyer, but imperfect, it is at the defendant's peril. See 3 Lev. 50. 1 Saund. 3.

1 Sid. 50, 97, 495. 1 Mod. 266. 1 Vent. 37. 1 Saund. 9, 122. Cro. Jac. 360. 1 Keb. 104. Keilway 71.

[* 499]

and should have pleaded performance to all the covenants therein. 2dly, The plaintiff was not obliged to give *oyer* of the indenture, and though he did, yet doing what he need not do, the setting it forth is not at his peril, as where he is *obliged to set it forth; nor is he concluded to say, that there is more contained in the indenture, but at liberty, as well as if the defendant himself had set it forth; and the Court held, that as the defendant was bound to set it forth, so he was bound to supply this omission, and make his plea complete; and, for this, judgment was given for the plaintiff.

*** A deed may be pleaded as lost by time or accident, without *profert*, *Read* v. *Brookman*, 3 *Term Reports* 151.

Vide Lutw. 1009. Cro. El. 464. 5 Co. 49, 50. Hutt. 21. 1 Show. 284. 2 Show. 334. 2 Hawk. P. C. cap. 37.

PARDON GENERAL AND SPECIAL.

1. DOMINUS REX *v.* PARSONS.

[Hill. 3 W. & M. B. R.]

Pardon for murder not to be allowed without writ of allowance, certifying sureties taken for the peace. See 1 Saund. 362. 1 Lev. 25, 26, 120. 3 Lev. 136, 332. Raym. 13, 370, 477. Faresl. 153. 1 Show. 283. S. C. Holt 519. *5 & 6 W. & M. c. 13.

PARSONS was indicted, convicted, and attainted for the murder of Mr. *Wade*, and pleaded their majesties' pardon; and *note*, it was for murder by express words, without any *non obstante*, the *non obstante* being taken away by the statute of *W. & M.** And *Holt*, C. J. asked for the writ of allowance, which should certify he had found surety of the peace within *eight* (*a*) months after the pardon; whereupon the writ of allowance was read: And *Holt*, C. J. said, that the Court ought not to allow the pardon till thus certified, and that this was a condition precedent, by the statute of *Edw.* 3.; and *Winnington* moved, that the pardon ought not to be allowed; arguing, that the crime could not be pardoned: But *Holt*, C. J. said, there was as good reason why the king should pardon an indictment of murder, which is his suit, as why a subject should discharge an appeal, which is the suit of the subject; and that the king was, by his coronation-oath, to shew mercy as well as to do justice. He said, the statute of 2 *Ed.* 3. *c.* 3. meant only, that the king should be fully informed before he pardoned any felony; and that the reason of that, and other restrictive statutes, was for that,

King may pardon murder by express words.

(*a*) Quere, if this ought not to be *three* months. *Vide* Preamble to 5 *W.* & *M.* *c.* 13.

after the statute of *Gloucester*, *c.* 9., upon a murder done, it was usual to apply to the Lord Chancellor, and gain a pardon by undue means and false suggestions, with general words in it; and this was the occasion of those restrictive statutes, that application should be made to the king in person, to the intent the king himself might be apprized of the matter. By 13 *R.* 2. *c.* 2., great difficulties are put upon those that shall be suitors for a pardon of murder, they are to incur a penalty, *&c.*, but this was found grievous to the subject, and therefore was repealed by 16 *R.* 2. *c.* 26., which shews the necessity there is that the king should have power to pardon; upon which the pardon was allowed.

March 213, 217. Raym. 13, 477. 1 Show. 28.

[500]

2. FOXWORTHY'S *CASE.*

[Hill. 1 Ann. B. R. 2 Ld. Raym. 848. S. C.]

FOXWORTHY pleaded his pardon, and there was a mistake in the proceedings. At another day he came, and having got the fault amended, it was allowed. His creditors now moved that they might have leave to charge him with actions, as *in custodia*, but were not permitted to do it: For, *per Holt*, C. J. that might defeat the queen's pardon, by rendering him incapable of performing the condition, which is, to go beyond the seas, *&c.*; and this is not unreasonable; for without the pardon the attainder had continued, and he must have been hanged; and there is no reason why the pardon should put the creditors in a better condition than otherwise they would have been, to the prejudice of the party; for the pardon was given for his benefit, and not for the benefit of his creditors.

One pardoned shall not be charged in custody with civil actions, quære? Raym. 370. 5 Co. 50. Far. 153. S. C. Holt 521.

Vide 1 Wils. 127.

PALATINE COUNTIES OF CHESTER, DURHAM, &c.

Vide ante 452. 2 Lev. 111, 223. 1 Chan. Cas. 41.

WILBRAHAM *v.* POLEY.

[Trin. 12 W. 3. B. R. 1 Ld. Raym. 591. S. C.]

MR. *Acherley* moved the Court to stay the return of a writ of error out of Chancery, to reverse an outlawry in the county palatine of *Chester*, according to the

Error to the county palatine of Chester.

opinion of my Lord *Coke*, 4 *Inst.* 214., *quod vide: Sed non allocatur;* for this old usage is gone by 32 *H.* 8. *c.* 43., and 33,* 34 *H.* 8. *c.* 13. There were no outlawries in *Chester* before 33 *H.* 8. *c.* 13., for coroners are there introduced by that statute; and there was no Chief Justice in *Chester* till Q. *Elizabeth's* time, for till then there being but one, there could be no Chief. *Vide* the account of this custom at large in *Dyer* 345, 320, 321.

Vide 1 Mod. 251. 2 Mod. 237. Ante 486. 11 Co. 25. b. Co. Lit. 125. b.

PARISH TOWN, VILL, &c.

1. RUDD *v.* MORTON.

[Mich. 4 W. & M. B. R.]

Evidence of a reputed parish within 43 Eliz. Vide Cro. Car. 92, 384. 396. 4 Mod. 157, 158. called Rudd. vers. Foster. Post. 572. Raym. 67.

UPON a trial at bar in *replevin*, wherein the defendant avowed as overseer of the poor, the question was, Whether *Stratton* was a reputed parish of itself, or part of the parish of *Biggleswade* in *Bedfordshire? Et per Cur.* To make *Stratton* a reputed parish, within 43 *Eliz.*, it must have a parochial chapel, and chapelwardens and sacraments, at the time the statute was made; and because the pretended parish of *Stratton* had but one chapelwarden, whose office it was to collect the rates taxed upon *Stratton*, and pay them to *Biggleswade*, they were held part of the parish of *Biggleswade*, and not a reputed parish within 43 *Eliz.*; and their having a distinct overseer, and maintaining their own poor, was not thought sufficient to make them a distinct parish.

Vill, quid. Vide 1 Inst. 115. b. 1 Lev. 78. See Hob. 296. 4 T. R. 552.

A parish shall be intended a vill *prima facie;* adjudged *Mich.* 6 *W.* 3., *Wilson* versus *Laws*.

If a place be named generally, that place shall be taken to be and intended a vill; adjudged *Mich.* 10 *W.* 3. *B. R. Vinkeston* versus *Ebden*.

[502]

2. DOMINUS REX *v.* BERNARD.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 94. S. C.]

Regularly a constable is to be chosen in the leet or turn; may be

INDICTMENT, for that he being chosen constable in a corporation, according to custom *debito modo*, refused to take upon him the office; and, upon demurrer, it was

said *per Holt*, C. J. that at common law all constables were chosen at the leet: Where there is no leet, at the turn: Whether by the steward or the homage, has been a great question: But without question, a corporation, of common right, cannot choose a constable: By custom they may, as having the government of the place reposed in them; but then they must prescribe for it.

in a corporation by custom. See 1 Salk. 175, 380. 1 Mod. 13. Alleyn 78. 1 Rol. Abr. 535. pl. 1, 2, 541. pl. 5. 1 Bulst. 174, 176. 5 Mod. 124, 127. Skin. 669. S. C. Comb. 416. Holt 152. Set. and Rem. 214. Cases B. R. 125.

PARLIAMENT.

See 1 Chan. Cas. 205, 341. & post. 509.

1. PRIDEAUX *v.* MORRIS.

Far. 13. S. C.

[Trin. 2 Ann. B. R.]

[* 503]

IN an *action on the case* for a false return of parliament-men, against the sheriff, the plaintiff declared, that whereas he was duly elected, the sheriff returned *A. B.* to be duly elected, who was, in fact, not duly elected. Mr. *King* objected, that the right of election was only to be determined in the House of Commons; for that it was a parliamentary matter, which ought not to be tried here, no more than the right of precedence. Mr. *Eyre contra*, That this Court may determine what is an act of parliament, 8 *Co.* 1., their privileges, *Mo.* 67. 1 *Ro.* 903. *Dyer* 275., the right of peerage: and here the right of election is no otherwise in question, than as it is incident to the falsity. *Holt*, C. J. the cause of the plaintiff's suit is a wrong done out of parliament, and whatever falls under the regulation of law, and is done out of the houses of parliament, is subject to the law of the land, for laws are to be executed out of parliament; But as for the rules of the *House, as sitting, meeting, &c., they are within the House, and the judges cannot know them, there being no practice of them out of parliament: But if the parliament should make a law concerning them, or they should become necessary to be determined on the account of some other matter cognizable by the judges, the judges must take notice and determine them, as in *Bynion*'s case.

No action lies at common law against an officer for a false return of members to parliament, unless where the right is determined, or cannot be determined in parliament. See 6 Mod. 45, 49. 1 Salk. 19, 20. 5 Mod. 311. Polexf. 473. 3 Lev. 29, 30. Lutw. 88. 2 Sid. 168. 2 Lev. 50, 86, 114, 250. 2 Vent. 50. 1 Vent. 206. 6 Mod. 100. 1 Lutw. 82. N. L. 31. Holt 523. 8. S. T. 9. Mod. Cases 48.

King's Courts may judge of parliamentary matters incident. See 6 Mod. 45, 49. 2 Vent. 25. Polexf. 470. 2 Keb. 356, 433, 435, 664. Lutw. 88, 89. Hob. 43. 1 Cro. 142, 535. 1 Jo. 194. See 1 Wilson 127, where

And *Holt*, C. J. seemed to be of opinion, 1st, That for a double return no action lay against the sheriff before the statute of 7 & 8 *W.* 3. *c.* 7., not only because it is the only method the sheriff has to indemnify himself; but

C. J. Willes says, he shall always set his face against this case of Prideaux v. Morris.

when the right comes to be determined in parliament, one indenture returned is taken off the file, and then there is no double return. 2dly, He seemed to think, that for a false return the party could have no action, where there might be a determination in the House of Commons, because of the inconvenience of contrary resolutions; and so if a suit between *A.* and *B.*, *A.* is voted elected, *B.* cannot bring an action, and say, that he was duly elected and returned, because his name does not appear upon record; and he is estopped to say, that *A.* was not duly elected and returned; but where the right of election either is determined, or cannot be determined in parliament, as in case of a dissolution, an action lies for the false return, for the courts at law can neither anticipate nor contradict their judgment. Upon a writ of error of judgment in *C. B.*, for the defendant (*a*).

(*a*) In the case of *Wynne* v. *Middleton*, 1 *Wils.* 125, *Willes*, C. J. in delivering the opinion of the judges in the Exchequer-chamber, said, he was clear that an action would lie at common law for a false or double return of a member of parliament, and that it was not necessary that there should be a determination in the House of Commons as to the election before an action for a false return could be brought. He said he should always set his face against the case of *Prideaux* and *Morris*. The point decided in *Wynne* and *Middleton* was, that in an action upon the statute it is not necessary to appear that there was any resolution of the House of Commons respecting the right of election.

5 Mod. 311, 312.

2. DOMINA REGINA *v.* PATY & AL.

[Hill. 3 Ann. B. R. 2 Ld. Raym. 1105. S. C.]

On commitments by the House of Commons for privilege, no court can deliver on a habeas corpus: Held by three judges against Holt, C. J. See 1 Salk. 19, 20. 6 Mod. 45. 1 Mod. 145. 2 Lev. 114, 250. & ante 502. 2 Show. 84. Pollexf. 470. Faresl. 13. 6 Mod. 49. Holt 526. S. C. 3 Keb. 365, 389, 664.

THE defendants having been committed to *Newgate* by the House of Commons, were now brought into court by several writs of *habeas corpus;* and the cause of their commitment was returned to be a warrant signed *Robert Harley*, Speaker, requiring the keeper of *Newgate* to take into his custody the several persons, defendants, for having commenced and prosecuted an action at law against the constables of *Aylesbury*, for refusing their votes in the election of members of parliament, in contempt of the jurisdiction and open breach of the known privileges of the House of Commons. Mr. *Lechmere*, *Page*, *Montague*, and *Denton*, who were of counsel for the prisoners, prayed that they might be discharged for several reasons: 1st, Because the warrant was not under seal, as it ought to be. 2dly, Because the commitment was to remain during pleasure. 3dly, Because they had done no unlawful act; for the prosecution of a suit is lawful, and no breach of the privilege of that House. But *Powell*, *Powys*, and *Gould*, Jus-

tices, held, 1st, That the commitment was well enough in form; because it was according to the usual manner of commitments by that House. 2dly, That the House of Commons were the proper judges of their own privileges; and this Court was now estopped to say, that this was not a breach of the privileges of the House of Commons, or that the House of Commons had no such privilege. *Holt*, C. J. *contra*, said, that this was no breach of privilege of the House of Commons; that the commencing and prosecution of an action did not necessarily imply a going farther than the bare filing and continuing of an original, which is no breach of privilege: He said, the suing was no breach of privilege, nor can their judgment make it so, nor conclude this Court from determining contrary; when the House of Commons exceed their legal bounds and authority, their acts are wrongful, and cannot be justified more than the acts of private men: That there was no question but their authority is from the law, and as it is circumscribed, so it may be exceeded: To say they are judges of their own privileges and their own authority, and no body else, is to make their privileges to be as they would have them. If there be a wrongful imprisonment by the House of Commons, what Court shall deliver the party? Shall we say there is no redress, and that we are not able to execute those laws upon which the liberty of the queen's people subsists? To conclude, All Courts are so far judges of their own privileges, and intrusted with a power to vindicate themselves, that they may punish for contempts; but to make them, or any Court, final judges of them, exclusive of every body else, is to introduce a state of confusion, by making every man judge in his own cause, and subverting the measures of all jurisdictions (*a*).

Filing and continuing original, no breach of privilege.

Authority of Commons circumscribed by law. Post. 512.

And now a new question was started and referred to the judges, Whether the queen ought to allow a writ of error in this or any other case *ex debito justitiæ*, or *ex mera gratia?* And ten of the judges were of opinion, that the queen could not deny the writ of error; but it was grantable *ex debito justitiæ*, except only in treason or felony. *Vide* 2 *Lev.*, *Thurston*'s case. *Price* and *Smith* held, that the

Writ of error is of right in all cases, except treason and felony. See 2 Show. 85, 98. 6 Mod. 130.

(*a*) This question was again brought before the Court of King's Bench in the Hon. *Alex. Murray*'s case, 1 *Wils.* 299.; and before the Common Pleas in the case of *Brass Crosby*, 3 *Wils.* 188. *Bl.* 754.; in both of which it was ruled, according to the above decision, that a person committed by the House of Commons for a contempt cannot be discharged by a Court of common law. The learning upon t[illegible] most fully in *Crosby*'s case, as reported by *Wilson*; from which it seems that all Courts are final judges of contempts against themselves. *Vide* 4 *Inst.* 15, 17. 1 *Sta. Tr.* 89. 2 *Sta. Tr.* 617, 620. 3 *Sta. Tr.* 208. 7 *Sta. Tr.* 437. 11 *Sta. Tr.* 317. 2 *Hawk.* ch. 15 sec. 72, 73, 74.

subject could not of right demand them in any criminal case: Then it was a doubt whether any writ of error lay upon a judgment given on a *habeas corpus.*

3. COUNDELL *v.* JOHN.

[Hill. 5 Ann. B. R.]

Action lies, not for a false return, but upon the statute 7 & 8 W. 3. 1 Wils. 125. See 6 Mod. 45, 49. 1 Salk. 19, 20. 5 Mod. 311. Faresl. 13. Pollexf. 470. 3 Lev. 29, 30. Lutw. 88. 2 Sid. 168. 2 Lev. 50, 86, 114, 250. 3 Keb. 26, 32. 1 Vent. 206. 2 Vent. 25. 1 Danv. 205.

[* 505]

IN *case;* the plaintiff declared that he was elected member of parliament for such a borough, pursuant to the queen's writ, *&c.*, and that the defendant returned two other persons to be elected, and that he the plaintiff petitioned the House, and was adjudged by *them to be duly elected, and his name ordered to be inserted in the return, and the name of the other to be rased. After verdict on not guilty, the defendant moved in arrest of judgment, that here is no cause of action; for it appears now, the plaintiff has had the effect of his election, he is returned; he has his place; there is nothing wanting wherein he can pretend himself injured, but the costs he has been at in the prosecution; and as to them, it ought to be supposed, that the House considered of them. This was endeavoured to be made good upon the statute 7 & 3 *W.* 3. But Sir *Tho. Parker*, for the defendant, answered, That this declaration cannot be taken to be founded upon that statute, because the fact was laid not agreeable to it, nor was it such an action as was intended by the statute, which differs from a general action; for, first, an action grounded upon a general prohibition of a statute, ought not to be for the party only, but the queen and party *tam quam;* for a fine is due to the queen for the breach of the statute, as well as satisfaction to the party injured. *Et per Cur.* Where a statute introduces a new law, by giving an action where there was none before, or by giving a new action in an old case, the plaintiff need not conclude *contra formam statuti.* But if a statute gives the same action, with a difference of some circumstances, as double damages, *&c.* the plaintiff must either conclude *contra formam statuti*, or make his case so particularly within the statute, that it may appear to be so; and because he had not done it in this case, judgment was given for the defendant.

Vi. 1 Salk. 212.

PARSON, VICAR, AND CURATE.

Vide 2 Lev. 61. 3 Leon. Cas. 46 & 148. 4 Leon. Cas. 367. Cro. Car. 105. Cro. El. 490.

BIRCH *v.* WOOD.

[Hill. 10 W. 3. B. R.]

WOOD, pretending to be curate of a chapel of ease in the parish of *Preston*, sued the vicar of the parish in the Spiritual Court, for the arrears of a pension claimed by prescription; and a prohibition was granted *nisi causa;* for that the curate was removable at the will of the parson, and so cannot prescribe, but his remedy must be by *quantum meruit.*

Curate is removable at the will of the parson. Cases B. R. 249. S. C.

Vide Farcsl. 63. *That parish-bounds are not to be proved by the parson.*

Vide 2 Vez. 425. Doug. 142. Cowp. 437.

PAUPER.

Poor prisoners, vide post. 521. 2 Lev. 142. 6 Mod. 22, 301.

1. ANONYMOUS.

[Mich. 9 Will. 3. B. R.]

A *PAUPER* shall not pay costs, unless he be nonsuit; but then he shall pay costs, or be whipped; *per Holt*, C. J. *Quære tamen;* for afterwards, in another term, I moved that a *pauper* might be whipped for non-payment of costs upon a nonsuit, and the motion was denied *per Holt*, C. J. saying, he had no officer for that purpose, and never knew it done. *Note also;* If a *pauper* gives notice of trial, and does not proceed, he shall be dispaupered.

Pauper shall pay costs of nonsuit. See 1 Sid. 261. 6 Mod. 88. Faresl. 114. 3 Salk. 107.

Vide Str. 983. Fort. 320. 3 Wils. 24.

2. ANONYMOUS.

[507]

[Mich. 11 Will. 3. B. R.]

MR. *Northey* moved to dispauper a parson, who was plaintiff in an action, because he had a living of 40*l.* *per annum.* *Turton* and *Gould*, Justices, *contra*, because he

Dispaupering.

swore he was in debt more than it was worth. *Holt*, C. J. differed from them; for his being indebted, or his estate being mortgaged, is no reason; it is enough that he has a considerable estate in possession.

Vide ante 442. 2 Lev. 203, 212. 6 Mod. 36. Post. 519.

PAYMENT AND SATISFACTION, &c.

1. MASON *v.* WILLIAMS.

[In Canc.]

Executor may pay debts of a higher nature after a decree quod computet, not after final. See Cro. El. 796. 2 And. 157. 1 Rol. Abr. 925, 927. 1 Sid. 21. Vaugh. 89. 5 Co. 28. 2 Chan. Cas. 54, 84. 2 Vern. 299. Prec. Chan. 79. 1 Vez. 214.

PENDING a bill in equity against an executor, or after a decree *quod computet*, an executor may pay any other debt of a higher nature, or as high a nature; but this must be intended where he has legal assets; for if he has only equitable assets, the Court will not indemnify him, and suffer him to prejudice and disappoint the first suitor; and where there is a final decree against an executor, and he pays a bond, it is a mispayment; for a decree is in the nature of a judgment (*a*). *Per Cowper*, Lord Chancellor.

(*a*) This is only true so far as relates to personal estate, *Bligh* v. Lord *Darnley*, 2 *P. Wms.* 621. *Vide Morrice* v. *Bank of England*, *Temp. Talb.* 222. *Astley* v. *Powis*, 1 *Vez.* 496.

2. CARTER *v.* SHEPPARD.

[Pasch. 10 Will. 3. B. R.]

[* 508]

A. receives money of B. by the hands of C., it is A.'s money, and he must abide by the loss. See 6 Mod. 36. 2 Salk. 442. 5 Mod. 298. S. C. Comb. 475. Cases B. R. 189. Vide ante 442, &c. ib. 3 Mod. 86. 3 Lev. 299. 2 Show. 296, 297. Molloy li.

UPON a point referred at *nisi prius*, the case was, *H.* having a note of 100*l.* upon a goldsmith, goes to receive it: While he is in the shop, one *Daly* brought money in to pay the goldsmith, who thereupon orders *H.* to receive the money of *Daly*; accordingly *H.* receives 50 *l.*, part of his hundred, pulls a bag out of his pocket, puts the money into his bag, lays it down by him, and proceeds to tell the rest; in the mean time * a stranger comes in, catches the bag of 50*l.* from him, and runs away. *H.* brings *trover* against the goldsmith for his note, pretending the property of the 50*l.* remained in the goldsmith, though put into the plaintiff's bag; for he had still a right to count

it over, and so it was not absolutely paid to the plaintiff. *Cur. contra: H.* had appropriated the money, by putting it into his bag, and might bring *trover* for the bag and money, as well as if he had put both bag and money into his pocket.

2.c. 10. Comb. 475. S. C. Hob. 154. 2 Mod. 23, 24.

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3. MARLE *v.* MAKE.

[Trin. 13 Will. 3. B. R.]

PAYMENT to a bond with condition indorsed, is a good plea before breach, but not afterwards, no more than to an action of debt upon a single bill; for the benefit of the condition is lost when the breach is made (*a*). *Per Holt*, C. J.

Payment before breach or after. Vide Lutw. 472, 473 5 Co. 117. 3 Salk. 118. S. C. Holt 122. 2 Wilson 150. 2 Stran. 994.

(*a*) But now, by stat. 4 and 5 *Ann.* c. 16., if the money is paid any time before the action brought, it may be pleaded.

4. CRANMER'S *CASE.*

[In Canc.]

MRS. *Fisher* was indebted in 50*l.* to *Cranmer*, and left him a legacy of 500*l.*, and made him executor, and, after the making of her will, borrowed 150*l.* more of him, and died. The Master of the Rolls decreed that this legacy should be a satisfaction of both the debts, that contracted after the will, as well as that contracted before; but *Harcourt*, Lord Chancellor, reversed the decree, because a court of equity ought not to hinder a man from disposing of his own as he pleases; and when he says he gives a legacy, we cannot contradict him, and say he pays a debt; and as to the debt contracted afterwards, he said there was no pretence to make this to be a payment of that: If a legacy be less than the debt, it was never held to go in satisfaction; so if the thing given was of a different nature, as land, it should not go in satisfaction of money; so if the legacy be upon condition, for by the breach he may be a loser, whereas the will intended it for his benefit. *Note;* In all these cases the intention of the party ought to be the rule.

Legacy to a creditor, greater or less than the debt, how to be taken. Vide Cuthbert cont. Peacock. Ante 155, 415, 436. 2 Chan. Cas. 25.

Vide 2 Atk. 300. 1 P. Wms. 299. 3 Atk. 65 1 Vez. 262. 2 Vez. 617, 635. Vide also, note on this point, 1 Salk. 155.

Payment to the sheriff on a *fi. fa.* is good, not so to the gaoler. 2 *Lev.* 203.

Where payment to the plaintiff by the bail is a discharge. *Vide ib.* 212.

Note: Payment was formerly no plea to a *sci. fa.* on a judgment in debt, but now it is by the stat. 4 & 5 *Ann. cap.* 4. 3 *Lev.* 19, 20.

Vide Parliament Cases, pag. 1 to 11. Faresl. 15, 38. 1 Chan. Cas. 221. 2 Chan. Cas. 163, 224.

PEERS OF THE REALM.

1. REX & REGINA v. KNOLLYS.

[Trin. 6 W. & M. B. R. 1 Ld. Raym. 10. S. C.]

Ante 47. S. C. Post. 512. 3 Salk. 242. Carth 297. Comb. 273. Skin. 336, 517. Cases B. R. 55. Holt 530. Trem. 11. 8 S. T. 50, 58.

INDICTMENT was found at *Hicks's Hall* against *Charles Knollys*, for the murder of Captain *Lawson*, which was removed into *B. R.* The defendant pleaded in abatement, that *William Knollys*, Viscount *Wallingford*, by letters patent under the great seal of *England*, which he produced in court, bearing date *August* 18., 2 *Car.* 1., was created Earl of *Banbury*, to him and the heirs-male of his body: That *William* had issue *Nicholas*, who succeeded him in the said title; and that the said honor descended to him the defendant from the said *Nicholas*, as son and heir: *Et hoc paratus est verificare.* It was replied, that 14 *Decemb.* 4 *W. & M.*, the said defendant petitioned the lords then assembled in parliament, to be tried by his peers, and the lords disallowed his peerage, and dismissed the petition.

The defendant demurred, and the attorney-general joined in demurrer.

The first point considered *per Holt*, C. J. was, What an earldom was, and wherein it consisted?

Before the time of *Ed.* 3. there were but two titles of nobility, *viz.* earls and barons.

Baron.

Barons were originally created by tenure, afterwards by writ, and last of all by patent; *scil.* about 11 *R.* 2.

Earl, his creation and office. Note; In the Saxon times the earls of counties being officiary, were elected by the freeholders in their folkmotes, and were removable for male administration. Vide LL. Edw. c. 35. LL. Eadgari, c. 5. LL. Canuti, c. 17. and Saxon Chron. sub. anno 1055.

As to earls, 1st, They were always created by letters-patent. *Vide Seld.* 536.

2dly, An earldom consisted in office for the defence of the kingdom. *Vide Bract. lib.* 1. *c.* 8. *Comites* had their name, not from counties, but *a comitando regem.* 9 *Co.* 49. It may be entailed as any other office may, within *Westm.* 2.

3dly, Earldoms consist of rents and possessions, *&c.*, which were anciently great. *Vide mag. char.* The relief of his heir is 100*l.* This being premised, he went on to consider the objections:

1st, That it is not alleged by the defendant that he is *unus parium regni Angliæ*, but only *unus parium regni;* nor is *Banbury* alleged to be in *England*, and an *Irish* peer may be made under the great seal of *England*.

To this he answered, That the great seal of *England* is appropriated to *England*, and what is done under it has relation to *England*, and to no other place; and though the king may create an *Irish* peer under his great seal of *England*, yet that must be by express words, being by special act of prerogative. An act of parliament does not extend to *Ireland*, unless particularly named; and it is a foreign intendment to suppose him an *Irish* peer, and therefore is to be rejected.

King may create an Irish peer under the great seal of England, by express words. 2 Vent. 4. Dyer 303.

The place from whence an earl takes his title, is not material; it is not necessary there should be such a place in *England*, or indeed any where. *Albemarle* is not in *England*, and there is really no such place as *Rivers*, though we have an earl of that name.

Place whence title is taken; not material. Co. Lit. 20. a. 13 & 14 Ed. n.

2dly, It is objected, That the defendant ought to have concluded his plea, with *prout patet per recordum*, and have produced a writ to certify the discents.

As to the writ to certify the discents, that is not of necessity, but used merely for expedition; and if his peerage had been created by a writ, then it would have been triable by the record, and this is a fatal exception: But letters patent may be pleaded and shewn to the Court, and the adverse party cannot deny them: And as this case is, here being discents, if the defendant had concluded as the king's counsel say he should, it would have been an impracticable conclusion, and consequently void. And in the precedents cited of the other side, there were no letters patent pleaded; nor could there in this case be any such issue as earl, or not earl; for the letters patent under the great seal could not be denied or questioned, but by pleading *non concessit*.

3dly, That the defendant is concluded of his peerage by the order of the House of Lords.

To this *Eyre*, J. said, The defendant had a title to his honour by legal conveyance, and that it was under the protection of the common law, and could not be taken from him but by legal means. That the House of Lords could no more deprive one of a peerage, than they could confer a peerage. That the defendant's right stood upon the letters patent, and his legitimacy; that the letters patent could not be cancelled without a *scire facias;* and that the defendant could not now be proved a bastard, or illegitimate.

House of Lords cannot deprive of peerage. Parliament Cas. 2, 3, &c.

Holt, C. J. gave these reasons: 1st, That this order was not a judgment of parliament; the parliament consists of the king, the lords spiritual and temporal, and the commons. The judicial power is in the lords only; yet legally and virtually it is the judgment of the king, if not of the commons; and writs of error in parliament are *coram nobis in præsenti parliamento. Vide Fleta, c.* 17. All

Judicial power of parliament is in the peers, but it is virtually the judgment of the king. All jurisdiction from the crown.

power of jurisdiction is derived from the king; if that be an author to be credited.

House of Peers has a double authority.

[* 511] * The House of Lords has a double authority, as parliament and the course of the house, between which we must distinguish by their style. Journals are no records of parliament, and therefore we cannot take notice of them. *Hob.* 110. *King* and *Hansdown* versus *Arundal* and *Howard*. Judgments ought to be given in their proper style; and therefore if this Court, which is *coram rege*, enter judgment *per justiciarios de B. R.* it is void.

But no original jurisdiction over a cause mixed with fact.

The House of Lords has no jurisdiction over an original cause mixed with matter of fact; because, 1st, that supreme court is the *dernier resort;* besides that, for the most part, original causes are mixed with matter of fact, and it is below the dignity of so supreme a judicature to try a matter of fact. It is for this reason, error in fact, in the Court of King's Bench, must of necessity be redressed before the judges of this Court. 2dly, If the parliament should take cognizance of original causes, the subject would lose his appeal, so much indulged by the common law in all cases. Causes come not thither, till they have tried all other judicatures. For this reason, within these four years, judgment was given against the earl of *Macclesfield* in the Exchequer; he brought error in the House of Lords; and the question was, Whether by 31 *Eliz.* 3. the Exchequer-chamber should not interpose? And the writ was abated; and it was held, that the Exchequer-chamber should interpose. This dignity is a title by common law; and if a patentee be disturbed of his dignity, the regular course is, to petition the king, who indorses it, and sends it into the Chancery. '*Vide Staundf. Prerog.* 72. 22 *E.* 3. 5. *Long.* 5° *E.* 4. 117. The king could give precedency by the common law, but is bound by 31 *H.* 8. *c.* 10.

When error lies not from the Court of Exchequer to the House of Lords.

Where a patentee is disturbed of dignity, how to proceed.

If a peer commits treason, he must be tried by his peers, and they may order a trial; but the king may choose whether he will make a high steward.

2dly, No plea was depending in the House of Lords; for the defendant did not petition to enjoy, but supposed himself in possession.

4thly, Here was no judgment. A Court can give no judgment in a thing not depending, or that does not come in a judicial way before that Court: Here the title of the earldom was not before them. If trespass be brought for a trespass done in the ground belonging to a house, and it appears at the trial the plaintiff has no title to the house, yet the Court cannot give judgment to turn him out.

Judgment must be complete and formal.

5thly, A judgment ought to be complete and formal. If a *quo warranto* be brought for usurping royal franchises, and the Court give their opinion that the defendant has

no title; yet unless they go on, *et quod ab inde excludatur, &c.* it is nothing. So in the case of *Lovell*, 2 *Cro.* 284. In debt on an obligation the defendant pleaded a bar by verdict and judgment in a former action wherein the entry [512] was, that the defendant should recover costs, *et quod eat inde sine die:* Here, because there was no judgment, *quod querens nil capiat per breve*, it was adjudged naught; for dismission is no judgment in a court of law.

Dismission is no judgment.

Objection: It is said that this judgment was given *secundum legem parliamenti.*

Answ. *Lex parliamenti;* must be looked on as the law of the kingdom; but admitting it were a particular law, yet if a question arises terminable in the King's Bench, the King's Bench must determine it. *Vide Dy.* 60.

Lex Parliamenti Ant. 503. 504.

14 *Car.* 2. *C. B. Binion* versus *Eveling.* Filing an original against a parliament-man was adjudged to be no breach of privilege. If a man be committed by parliament, and the parliament is prorogued, this Court will grant a *habeas corpus.* But no precedent hath been shewn to warrant the determining inheritances originally *per legem parliamenti;* if it be so determinable, it must be by act of parliament, but there is no such; or by custom, but there is no such custom. But if inheritances were determinable in parliament, without their having jurisdiction, they would have uncontrollable power, and *res est misera, ubi jus est vagum.* And he concluded that judgment should be given for the defendant, and accordingly the indictment was abated: So the defendant was not tried for the murder at all.*

Vi. st. 12 & 13 W. 3. c. 3. and 10 G. 3. c. 50.

Inheritances not originally determinable in parliament.

2. LORD BANBURY'S *CASE.*

[Pasch. 5 Ann. B. R. 2 Ld. Raym. 1247. S. C.]

LORD *Banbury* was taken on a *latitat* sued against him by the name of *Charles Knollys*, Esq. and it was now moved for a *supersedeas*, offering to shew the letters patent of creation, and an affidavit that he was the person; and it was agreed, That if the *latitat* had been sued against him by the name of lord, it should have been superseded; for the law supposes a peer able to answer the demand of any personal action, and the body is only liable for want of being responsible in substance: And if he had sat in parliament by virtue of any writ of summons, and had been sued as *Charles Knollys;* but not having sat in parliament, they could not take notice of his peerage, and would not proceed to try it on a motion.

H. arrested by the name of a commoner, the Court will not try whether a peer or not, upon a motion. Vide antea 451, 509. Parl. Cases, 2, 3, &c. Faresl. 15, 38. Rep. B. R. Temp. Hard. 34. 2 Str. 985.

3. SIR THOMAS MEERS contra LORD STOURTON.

[In Canc.]

Where a peer shall depose on oath or honour. 1 Will. Rep. 146. S. C.

[513]

SIR *Thomas Meers* exhibited a bill against the lord *Stourton*, and it was ordered that the lord *Stourton* should be examined upon interrogatories touching his title; and it was objected, that he being a peer of the realm, ought to answer upon his honour only; and it was ruled by *Harcourt*, Lord Keeper, that where a peer is to answer to a bill, his answer put in upon his honour is sufficient (*a*); but where a peer is to answer interrogatories, to make an affidavit, or be examined as a witness, he must be upon his oath.

(*a*) *Jones* 154.

See Fares. 101. 2 Show. 1, 2, 165, 486. 3 Mod. 116, 134. 6 Mod. 176, 168. 5 Mod. 343 and 348. 1 Hawk. P. C. cap. 69.

PERJURY.

5 Mod. 343. S. C. Carth. 421. Holt 535. Comb. 459.

DOMINUS REX v. GREEPE.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 256. S. C. Comyns 43. S. C.]

Innuendo. Vide Yel. 12. Cro. El. 497. Hob. 2, 3, 45, 461. Hutt. 65. Hetl. 174. Aleyn 39, 92. 1 Vent. 337. 1 Sid. 52. 2 Show. 305 and 411. 3 Mod. 53, 54. 3 Lev. 60, 166. Innuendo may explain or apply, but cannot add to, or change the sense. Carth. 421. S.C. 5 Mod. 233. 4 Rep. 17. Comb. 459. S.C. 3 Bulst. 265. 1 Bulst. 183.

AN information for perjury set forth, that the defendant, upon giving a lease and release in evidence in a certain cause, bearing date the 15th and 16th of *July* 1681, executed at *Albemarle-house*, to which Mr. *Stroud* was witness, swore that Mr. *Stroud* was, the middle of *July* 1631, at *Newnham*, *innuendo Newnham* in *Devonshire*, *ubi revera non fuit apud N. prædict.* A verdict was for the king, but judgment was arrested; and it was held,

1st, That *Newnham* was but an *inviduum vagum* without the *innuendo*, and might be as well *Newnham* in *Middlesex* as *Newnham* in *Devonshire*, or some far distant place: And if *Newnham* was at the next door, *Stroud* might be at *Newnham*, and yet be at *Albemarle-house* in *Middlesex* too in the middle of *July*.

2dly, That the *innuendo* could not restrain the *individuum vagum* to *Newnham* in *Devonshire*; for it is no averment, but in the nature of a *prædict.* It may serve for an expla-

nation to point out where there is precedent matter, but never for a new charge: It may apply what is already expressed, but cannot add or enlarge, or change the sense of the precedent words: So here, the word *Newnham* did not import *Newnham* in *Devonshire; ergo* the *innuendo* cannot enlarge the importance of it, and make it so significant. *Vide Sty*. 333. 3 *Cro*. 428. *Goldsb*. 191. *Hob*. 3, 6, 45. 1 *Ro*. 82, 83, 84. 2 *Bul*. 81, 82. 1 *Ven*. 337. *Hutt*. 44. 4 *Co*. 20. *Yelv*. 21. 1 *Cro*. 321. *A*. 32.

Vi. 1 T. R. 70. Bl. 960. Cowper 276, 684.

*3dly, That a man ought not to be drawn into a constructive perjury; and that if the matter of this oath was certain, it is material to the issue, and sufficient to be perjury; and *Holt*, C. J. denied *Golds*. 191., and held, that if a man gives evidence to the credit of a witness, though this be not the issue, yet it is perjury.

Perjury may be in evidence to the credit of a witness. 6 Mod. 168.

[* 514]

4thly, As to the objection, that this was an information at common law, and not on the statute, that makes no difference as to the certainty of the charge; for it is no more infamous now than it was at common law; the difference is only, that where *H.* is convict upon the statute, it is part of the judgment to be disabled; but at common law it is only a consequential disability: *Ergo*, in the latter case the king may pardon, and that restores him to his testimony; otherwise in the former, for in that case he must reverse the judgment, or cannot be restored.

Charge ought to be equally certain at common law, and on the statute.

Where H. is convict on the statute, disability is part of the judgment; at common law it is only a consequence. Vide ante 461. Post 689, 691.

*** It appears by the report in Ld. *Raymond* that the judgment in *B. R.* was reversed in the House of Lords.

PLEAS AND PLEADINGS.

Vid. ante Abatement, Demurrers, Justification, &c. p. 496.

1. ANONYMOUS.

[Mich. 1 W. & M. B. R.]

IF a man be bound by recognizance to appear the first day of the term, and is charged upon his appearance with an information, in case the information be laid in *Middlesex*, the party has time to plead during all that term, so that it cannot come to trial in the term; but in case it be laid in any other county, the party shall have time to plead till the next term, for he is as much concerned to defend

Upon an information in Middlesex, the defendant shall have the term to plead; in the country till next term. Post 624, 650. Mod. Cases 22. 1 Salk. 219.

himself in those cases as in any civil action; and since the law allows him counsel, the law allows him time likewise to consult with them; for not to allow the means of defence, is to take away the subject's defence; otherwise it is of capital offences: But *note;* In these cases there is no counsel. Also where the party comes in by *cepi corpus*, or upon an outlawry, he shall plead presently, for then he has been guilty of a contempt. *Per Cur.* Contrary to the case of the seven bishops.

Time to plead, vide post. pl. 3, 4.

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[515]
Vi. 2 Lev. 12, 75.

2. WOODWARD *v.* CLIFF.

[Pasch. 2 W. & M. B. R.]

Testatum existit is only recital. Post 589, 699. 2 Lev. 74, 75. 1 Saund. 273, 274. Cro. Eliz. 195. 2 Cro. 383, 537. Cro. Car. 188. 2 Leon. 64. 2 Jon. 229. 1 Sid. 375.

IN covenant, the plaintiff declared that he was seised in fee, and that by indenture made between the plaintiff and *Eliz.* his wife, *ex una parte*, and the defendant of the other part, *testatum existit* that the plaintiff and his wife demised. It was objected, that it being shewn that the husband was sole seised, the husband and wife could not demise; *sed non allocatur;* for it is not affirmed, but only that by the indenture it is witnessed, for the *testatum* is a rehearsal of that.

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3. HALL *v.* ENGLESTONE.

[Mich. 8 Will. 3. B. R.]

Difference between time to plead on a habeas corpus and a capias. Ante pl. 1. Post. pl. 15. Vide 2 Wils. 395.

UPON a *habeas corpus* returnable in *Michaelmas* term, if the declaration be delivered before *crastinum animarum*, the defendant must plead to try; but upon a *cepi corpus* he is only to plead to enter. So in *Easter* term, if the declaration be delivered before *mens. Paschæ*, the defendant on a *habeas corpus* must plead to try; upon a *cepi corpus* to enter only.

4. ANONYMOUS.

[Mich. 8 Will. 3. B. R.]

IF a declaration be delivered against one in custody, he shall have the whole term to plead in abatement.

5. ANONYMOUS.

[Mich. 8 Will. 3. B. R.]

Waiver of special pleadings. Fareal. 50.

BEFORE joinder in demurrer, the defendant may waive his special plea, and plead the general issue; *per Cur.* But if there be a rule to plead, so as to stand by it, and the defendant pleads a special plea, as he may, and the plaintiff demurs, the plaintiff [*defendant*] shall not then waive and plead the general issue (*a*).

(*a*) The defendant was refused the liberty to waive a sham plea and plead the general issue, *Ellis* v. ——— ———, 2 *Wils.* 369. So a special plea, after the intervention of a term, the plaintiff's only witness on the general issue having gone abroad since issue joined, *Freeman* v. *Jones*, 2 *Wils.* 391. If a defendant pleads a special plea, and is ruled to plead such a plea as he will abide by; if he waives the special plea, he can only plead the general issue, *Hare* v. *Lloyd*, *Prout* v. *Dewar*, 1 *T. R.* 693.; but he may give notice of set-off, note *ibid.* In the Common Pleas the defendant must always abide by his plea, *Imp. C. B.* 308. *Cooper* v. *Mansfield*. The Court will give the defendant leave to withdraw the general issue, and plead it again with a special plea to let in the real merits, *Wilkes* v. *Wood*, 2 *Wils.* 204.

6. PIERCE *v.* BLAKE.

[Hill. 8 Will. 3. B. R.]

Attorney fined for assigning errors notoriously false and frivolous. S. C. Holt 560. 1 Salk. 30, 20, 202, Latw. Rep. 236. Styl. 225. Sid. 329. 1 Saund. 97, 98.

THE defendant pleaded a false plea in abatement, *viz.* that the plaintiff was dead; the Court was moved, that the attorney might be compelled to swear it. *Et per Holt*, C. J. We cannot compel him in any case to swear his plea, but where it is a foreign plea; but the attorney, if he puts in a false plea to delay justice, breaks his oath, and may be fined for putting a * deceit upon the Court. [* 516] He remembered a case where judgment was given against a defendant above forty years of age, upon which judgment he brought a writ of error, and assigned infancy, and appearing by attorney for error, and the Court fined the attorney: In the principal case the Court ordered the attorney to plead immediately, so as he would stand by it; or the Court, if he did not, would inquire into the truth of the plea, and, if they found a deceit and a trick, they would fine him.

Note; The Court will not order a man to plead peremptorily till the rules be out.

7. BROWN *v.* CORNISH.

[Pasch. 9 Will. 3. B. R. 1 Ld. Raym. 217. S. C.]

Onerari non debet proper only where there never was a charge.

INDEBITATUS assumpsit and *quantum meruit* for 20 *l.* The defendant pleaded *onerari non debet*, because he paid the money at the time, *&c.*, *et hoc paratus est verificare;* the plaintiff demurred. *Et per Holt*, C. J. 1st, This plea does not amount to the general issue, because it admits the cause of action (*a*). 2dly, *Onerari non debet* is no plea here, because he allows the promise to be a good promise, but avoids it by matter of discharge *ex post facto;* in this case he should have pleaded *actionem non*. But where the matter of the plea shews there never was a good cause of action, *onerari non debet* may be proper; thus in debt on a bond, defendant may plead *onerari non debet quia riens per descent*. 3dly, The plea was misconcluded, for he ought to conclude to the country.

Vide 1 And. 20. Carth. 88.

(*a*) *Vide ante* 344. *Skin.* 362. *Cro. Eliz.* 262.

8. Ashton *v.* Sherman. Mich. 9 Will. 3. B. R. *Vide* this Case, title *Executors*, pl. 10. page 298.

9. ANONYMOUS.

[Mich. 9 Will. 3. B. R.]

Plea after judgment in ejectment.

IF judgment in ejectment be signed in a country cause for want of a plea, but no possession delivered, a judge in his chamber, at any time before the assizes, may compel the plaintiff to accept a plea; but if possession be delivered, he is without remedy; *per Holt*, C. J.

[517]

10. GRAY *v.* HART.

[Hill. 9 Will. 3. B. R.]

In justifying under a writ, it is not enough to shew where returnable, but must shew whence it issued. S. C. 2 Lutw. 1488. N. L. 470. Cro. Eliz. 804.

IN *assault and battery*, the defendant pleaded a writ to the sheriff returnable in *C. B.*, and a warrant to him to arrest the plaintiff, *&c.*, and did not shew from what court the writ issued; and it was held naught; for it might be a writ out of the King's Bench or the County Palatine, and they would not intend it a writ out of Chancery: So if *H.* plead a judgment, he must shew in what Court; for to put the adverse party to search in every court, would be infinite.

11. ANONYMOUS.

[Mich. 10 Will. 3. B. R.]

THE Court resented the number of frivolous sham pleas which came before them, saying, it was against the duty of counsel, and against the statute *W.* 1. *c.* 29., and that the old rule ought to be revived, *viz.* that counsel should set their hands to the books delivered to the judges, which was anciently so ordered, that the Court might not be troubled with frivolous pleas.

Sham pleas.

Vide 2 Wils. 369.

12. PASMORE *v.* SERJ. GOODWIN.

[Trin. 11 Will. 3. B. R.]

SERJEANT *Darnel* moved for an imparlance till the next term, because the defendant was an officer of the Court, and the bill was not filed against him, so as to give him eight days within term to plead; but the Court held, that the day of the bill filed is one day, so that the plaintiff may give rules that day; also they agreed, that Sundays and holidays are to be reckoned in; And the clerks said it was sufficient that he had four days in term, *quod Curia concessit;* Mr. *Clark* said, that anciently there were two rules given, both four-day rules; the first was *ad respondendum*, the second *ad respondendum peremptorie*, which two were now turned into one eight-days rule (*a*).

Upon bills filed against officers it is sufficient, if there be four days within term to plead. Vide ante pl. 1, &c. ib. Comberb 19, 251, 253. Faresl. 62. Str. 86.

(*a*) It is now only four days inclusive, 2 *Str.* 1192.

13. ANONYMOUS.

[Trin. 11 Will. 3. B. R.]

THE question was, Whether there ought to be new rules to plead upon an amendment? *Pew*, clerk of the papers, said, that if the plea was of another term, there ought to be new rules; otherwise if it be a plea of the same term, because there is a rule to warrant the judgment. *Holt*, C. J. Anciently they did not plead *de novo* after an amendment; therefore giving rules to plead again, cannot be [518] the ancient course; because the practice of pleading *de novo* is but of late introduced, but with great reason: When the plaintiff amends and gives an imparlance, there should be new rules; otherwise not.

No new rules to plead after an amendment, unless an imparlance be given. Post. pl. 20.

See 1 Salk. 47. *Information amended after plea pleaded.*

Quær

14. WOOD v. CLEVELAND.

[Pasch. 12 Will. 3. B. R.]

Judgment set aside, though strictly regular, in order to try the merits. Vide 6 Mod. 191, 341. 1 Salk. 390, 401. 1 Mod. 1. Faresl. 3. 1 Rol. Abr. 774. pl. 1. Cro. Car. 443. Hob. 194. S. C. Holt 560.

IN a common *action of trespass*, the plaintiff signed his judgment for want of a plea; the defendant after term, and before the assizes, offered him a special plea, or to plead the general issue, provided the plaintiff would consent to enter into a rule, that he should at the trial be allowed to give special matter in evidence; the plaintiff refused, and executed a writ of inquiry. And now Sir *Bartholomew Shower* moved, that upon paying costs the judgment might be set aside, and the plaintiff obliged to accept their plea and go to trial, the plea being fair and containing special matter of title. The motion was granted; for *per Holt*, C. J. where the defendant's plea was a fair plea, and no delay affected, we will interpose; otherwise where a plea contains special matter that is questionable, and was designed to draw the plaintiff to demur.

15. ANONYMOUS.

[Trin. 12 Will. 3. B. R.]

Str. 823. Barnes 342. 1 Bur. 568. How the defendant shall plead after a voluntary appearance.

THERE was a question, If a man appears voluntarily before *mensem Paschæ* in *Easter* term, whether he be obliged to plead to enter? Sir *Samuel Astry* and Mr. *Clark* were of opinion he was not. But *per Holt*, C. J. There is no difference between a voluntary appearance and an appearance upon a *cepi corpus;* for a voluntary appearance is not good, unless a writ hath been taken out: And there is no reason for it; for if the plaintiff be content with a voluntary appearance in case of the defendant, there is no reason why the plaintiff should be in a worse condition than if he had arrested him. Let the rule be, if a writ be taken out, and the defendant agrees to appear, he shall appear and plead according to the return of the writ, and if the return be before *mensem Paschæ*, he shall plead to enter; but if no writ were taken out, he shall not be obliged to appear; but if a writ were taken out returnable after *mensem Paschæ*, he shall have an imparlance till next term.

Vide ante pl. 1 and 3.

16. PEIRCE *v.* PAXTON.

Vide ante 508. 2 Lev. 212.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 691. S. C.]

Payment of part, and acquittance pleaded puis darrein continuance is in bar. S. C. Cases B. R. 541. Holt 560. Vide 3 Lev. 230. Lutw. 1177, 1142. 5 Mod. 12.

IN *debt on a bond*, the defendant *puis darrein continuance* pleaded payment of part, and an acquittance in abatement. Upon demurrer, *Holt*, C. J. held it a plea in bar, and not in abatement. *Vide* 3 *Cro.* 342. *Al.* 63, 65. 3 *Cro.* 157. What is a bar before the action brought, is as much a bar after, for time makes no difference in the nature of the thing. *Vide* 7 *E.* 4. 15. *Sty.* 212. is a dark case. Entry into part differs; for this is without the consent of the plaintiff [*defendant*]. But the plea is not good, because the acquittance is a deed, and ought to be pleaded with a *profert* (*a*). Judgment to answer after.

(*a*) This is aided, except upon special demurrer, 4 and 5 *Ann.* c. 16.

17. ANONYMOUS.

[Trin. 13 Will. 3. B. R.]

Where a statute creates a new thing in writing, it must be so pleaded; but where it only adds it to a common law matter, it needs not be set forth in a declaration, but in a plea it must. Raym. 450. Lutw. 1425. 1 Sid. 142. 1 Lev. 81. Cro. Eliz. 438. Bull. N. P. 279.

IF an act of parliament makes writing necessary to a common law matter, where it was not necessary by the common law, you need not plead the thing to be in writing, but give it in evidence, but where a thing is originally made by act of parliament, and required to be in writing, you must plead it with all the circumstances required by the act; as upon the statute of *H.* 8. of wills, you must plead a will to be in writing; but a collateral promise, which is required to be in writing by the statute of frauds, you need not plead to be in writing, though you must prove it so in evidence (*a*). *Per Holt*, C. J.

(*a*) In *Villers* v. *Handley*, 2 *Wils.* 49. a plea that an heir had nothing but the reversion expectant on a term of 500 years commencing *anno* 1746, was held ill; because it did not state the term to be created in writing, [the report says *by deed*,] according to the statute of frauds. But this case does not appear to have been cited.

18. ANONYMOUS.

[Trin. 13 Will. 3. B. R.]

Nothing can be taken advantage of on a plea over which could not on a general demurrer. Vide 3 Wils. 297. 8 Co. 120. b.

IF a man pleads over, he shall never take advantage of any slip committed in the pleading of the other side, which he could not take advantage of upon a general demurrer. *Per Holt*, C. J. *See* 6 *Mod.* 136.

19. ANONYMOUS.

[Trin. 1 Ann. B. R.]

After bail-bond forfeited, defendant cannot plead in abatement in the original action.

IF a man has forfeited his bail-bond, and so is in *misericordia*, and the Court in favor of him stay proceedings thereupon, he cannot afterwards plead in abatement to the original action, but must plead in chief.

[520]

20. ANONYMOUS.

[Mich. 2 Ann. B. R.]

Amendment. Ante, pl. 13.

Vide 2 Bl. Rep. 785.

BY the course of the Court, if the plaintiff moves to amend his declaration the same term the defendant's plea comes in, the plaintiff need not give new rules to plead; but the defendant must plead in convenient time.

1 Salk. 47.

21. ANONYMOUS.

[Mich. 2 Ann. B. R.]

Reason of amendment while in paper.

SINCE pleading in paper is now introduced instead of the old way of pleading *ore tenus* at the bar; it is but reasonable after a plea to issue, or demurrer joined, that upon payment of costs the parties should have liberty to amend their plea, or to waive their plea or demurrer while all the proceedings are in paper.

S. C. 1 Salk. 208. 6 Mod. 157, 197. Ante 208.

22. FANSHAW *v.* MORRISON.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1138. S. C. with other points.]

Scire facias upon a recognizance of bail in error. See 6 Mod. 159. 1 Saund. 3, 6. 2 Lev. 7.

SCIRE facias upon a recognizance entered before a judge of the Common Pleas, upon a writ of error of a judgment given in that Court in debt, conditioned that if the plaintiff should be nonsuit, the writ of error discontinued, or judgment affirmed, that then he should pay, *&c.* The defendant prayed *oyer*, and pleaded that the plaintiff in error did prosecute the writ of error, and assigned errors, *et quod placitum super prædict. breve de errore adhuc pendet indeterminat', &c.* The plaintiff replied, that the judgment was affirmed, *absque hoc quod placitum pendet indeterminat', &c.* The defendant demurred, and judgment was given for the plaintiff in *C. B.*, and now upon a writ of error, the Court held, that where a man pleads a performance, he ought to plead it in the words of the

Performance must be pleaded in the words of the condition; otherwise of excuse. Lutw. 419, 420, 471, &c. 3 Lev. 245.

condition of the bond. 3 *Lev.* 293. 2 *Ven.* 221. *Dy.* 243. but otherwise where he pleads an excuse; and that the defendant's plea is an excuse in this case, and therefore it was not necessary to plead that the plaintiff in the writ of error was not nonsuit, nor the writ discontinued, nor the judgment affirmed; but that errors were assigned, *& placit. inde pendet indeterminat.*

1 Lev. 145, 303. Negative plea need not conclude prout patet per record. 3 Lev. 152, 311. 5 Mod. 8. 1 Lev. 54, 212. 1 Lutw. 111, 207, 264. Faresl. 106.

2dly, The Court held this plea was in the negative, and therefore there was no occasion for the defendant to conclude with a *prout patet per recordum:* But the plaintiff ought upon this plea to have replied, that the record was certified in *B. R.* such a term, *Et quod superinde talit. process. fuit quod judicium affirmat. fuit prout patet per recordum;* to which, if it was not so, the defendant might rejoin *nul tiel record.*

2 Lev. 190, 197.

2 Rol. Abr. 275.

[521]

3dly, The Court held the replication naught; 1st, Because it makes that matter of inducement which should have been the point in issue; and, 2dly, Because the traverse puts a matter of record in issue to be tried by the country. And upon this the Court were going to reverse the judgment, but an exception was started to the writ of error, for which it was quashed (*a*).

Traverse that puts matter of record in issue to the country, is ill. Raym. 50. Vid. 1 Saund. 20, 99. Lutw. 633, 1138, and Hustler v. Raines, ib. 1401. 1 Lev. 193.

(*a*) *Note;* It appears by the report in Lord *Raymond*, that the reason of the writ being quashed was, that it was a writ of Q. *Anne's* time, reciting judgment *super quaddam breve nostrum de sci. fa.*, whereas the judgment appeared by the record to have been given in the reign of King *William*.

23. Domina Regina *v.* Rawlins. Mich. 3 Ann. B. R.

Vide this Case, title *Imparlance*, pl. 3. ante 367. *When the defendant ought to plead to an information.*

24. TURNER *v.* BEALE.

[Pasch. 5 Ann. B. R. 2 Ld. Raym. 1262. S. C. Pleadings 3 Ld. Raym. 350.]

IN *assumpsit*, the defendant *cognovit actionem*, but in bar of execution as to his person, apparel, bedding, tools, *&c.*, pleaded 2 & 3 *Ann. c.* 16., and shewed that he was actually a prisoner in the *Marshalsea*, and that being there *tiel jour & ann*, he was *debita modo* discharged by the justices at such a sessions, *juxta formam statuti.* To this it was demurred; and insisted, that it did not appear that he petitioned; and the justices ought not to assume a jurisdiction and discharge prisoners without seeking, or whe-

Plea upon the statute for discharge of poor prisoners, ought to shew all qualifications and circumstances to bring the defendant within the act. Vide ante 345, 506. Mod. Cases 22, 301. S. C. Holt 565, 566.

ther they will or not; and the defendant ought to shew his qualifications, and that he is within the benefit of the act, and it ought not to be put upon the plaintiff, who is a stranger, to shew that he was not qualified. Mr. *Eyre contra* urged, that all was aided by *juxta formam statuti*. *Vide* 1 *Cro*. 314. 2 *Cro*. 609. *Holt*, C. J. The sessions cannot intermeddle, but upon application: You must shew your discharge, and that it was regular and not deficient; the plaintiff is a stranger, and it is not to come on his side that the discharge was deficient, but you must shew the whole matter, and give him an opportunity to traverse it. Judgment for the plaintiff.

Vide Plowd. 376. b. Litt. 162. 4 Mod. 47. Sav. 58. 3 T. R. 636.

25. WOODRINGTON *v.* DEVERILL.

[Hill. 5 Ann. B. R.]

S. C. Holt 567. Vide ante 441. Dr. & St. 130. Bro. Attachment, 20. 4 Co. 32, 58, &c. infra.

AFTERWARDS, *Hill.* 5 *Ann.*, *inter Woodrington* and *Deverill*, in debt on a bond, the same case happened as before, and then the case last mentioned was remembered, and without pretending to make good the plea in form, the statute of amendment of the law, 4 & 5 *Ann.* *c.* 16., was insisted on, *viz.* that judgment shall be given as the right
[522]
appears, &c. *Pengelly* for the plaintiff said, that here appeared no sufficient discharge, but a good cause of action for the plaintiff. *Powell*, J. said, that act did not help substance; that if this sort of pleading be made good, the Court can never know when particular jurisdictions act with authority, and when not; *quod Holt*, C. J. *concessit*, saying, this exposition was to take the party's issue from him.

PLEDGE AND BAILMENT.

ANONYMOUS.

[Pasch. 5 W. & M. B. R. 2 Ld. Raym. 912, 913, &c.]

Pawn-broker, ante 379. contra.

IF a pawn-broker refuses, upon tender of the money, to re-deliver the goods pledged, he may be indicted; for being secretly pawned, it may be impossible to prove a delivery in trover, for want of witnesses. *Per Holt*, C. J. and *Eyre*, J.

Vadium, a pawn or pledge. In this case the pawnee hath a property, for the thing is a security to the pawnee that he shall be repaid his debt, and to compel the pawner to pay it. Pawn, quid. Lit. Rep. 332. Kelw. 82.

Now, if the pawn be somewhat that will be the worse for wearing, as clothes, &c., the pawnee cannot use it. And how to be demanded.

But if it be somewhat that will not be the worse for wearing, &c., as jewels, &c., the pawnee may use them, but then it must be at peril; for if the pawnee is robbed in wearing them, he is answerable; and the reason is, because the pawn is so far in the nature of a *depositum*, that it cannot be used but at the peril of the pawnee; and the using occasioned the loss. *Vide Owen* 423. But if the pawn is laid up, and the pawnee is robbed, the pawnee is not answerable. 4 Co. 32, 38. Co. Lit. 89. Yelv. 178. Owen 124. 2 Cro. 224.

Also, if the pawn be of such a nature, that the keeping is of charge to the pawnee, as if it be a cow or a horse, the pawnee may milk the cow or ride the horse; and this is in recompence of the keeping.

If a creditor takes a pawn, he is bound to restore it upon payment of the debt; but if his care in keeping it be exact, and the pawn is lost, he shall be excused, for there is no default in him. 4 Co. 178. Co. Lit. 89.

And in case the pawn be lost, the pawnee hath still his remedy for the money against the pawner; for the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for the restoring the goods. Vide Str. 919.

If a pawn therefore be lost before tender, the pawnee is not liable, unless there be default in him; but if after tender the pawnee keeps the goods, and they are stolen, the pawnee must answer; for now his property is determined, and he is a wrongful detainer; and he that keeps goods by wrong must answer for them at peril, in all events; for his detainer is the reason of the loss. Delivered *per Holt*, C. J. in the case of *Coggs* and *Bernard* (*a*). *Trin.* 2 *Annæ B. R.* Lit. Rep. 332. Owen 124.

(*a*) *Vide* the principal point in this case, 1 *Salk.* 26., the very elaborate and celebrated argument of Lord Chief Justice *Holt*, in Ld. *Raymond*, *ubi supra*, and Sir *Wm. Jones's* Treatise on Bailments. *Per* Lord *Kenyon*, *Hil.* 33 *G.* 3., *Coggs* and *Bernard*, is a case of the very first authority.

POOR, POOR'S RATES, VAGRANTS, &c.

Vide titles *Orders, Sessions.*

1. *Inter* THE INHABITANTS OF THE PARISH OF TALBORN *and* BOSTON.

[Mich. 7 Will. 3. B. R.]

Taxation only without payment makes no settlement. Vide ante 478. pl. 21. Post 534, 536. 1 Show. 12. Comb. 282. Set. and Rem. 179. S. C. Vide Skin. 620. Foley 128.

IT was held, that if a man is taxed, and after taxation stays in the parish forty days without giving notice, it is no settlement within the new statute unless he pays the tax; for it must be *taxing and paying*, and not *taxing* only, that makes a settlement, and is equivalent to a notice in writing.

[524]

2. *Inter* THE PARISHES OF RYSLIP *and* HARROW.

[Hill. 8 Will. 3. B. R.]

Living in a parish where H. has land, gains a settlement. Vide ante & post 534, 536. 5 Mod. 419. Set. and Rem. 224. S. C. Vide Str. 476. 2 Sess. Ca. 211. Str. 1116. 1 Sess. Ca. 400. Bur. Set. Cas. 307.

PER Holt, C. J. Having land in a parish will not make a settlement, but living in a parish (*a*) where one has land will gain a settlement without notice; for the act of parliament never meant to banish men from the enjoyment of their own lands, and the law takes notice of freeholders, as those that chuse members of parliament, and are jurors. Also boarding as a scholar gains no settlement, no more than being nursed in a parish.

(*a*) *R.* That the residence need not be on the estate, provided it is within the parish, *Bur. S. C.* 125.

3. *THE CASE OF* THE PARISH OF SHOREDITCH.

[Mich. 10 W. 3. B. R.]

Justices may quash the whole rate where the rate is unequal,

AN order of sessions was made for quashing a poor's rate for the parish of *Shoreditch*. Exception was taken, that by the statute of 43 *Eliz.*, the justices could not quash

the whole rate, but were to relieve the parties grieved. *Sed per Cur.* If a rate be burthensome to a whole set of men, as in this case it was to landholders, the best way is to quash the whole rate; and the Chief Justice held, that if the justices quash this, they may make a new one themselves, but they are not bound to do it, but may order the ancient inhabitants to do it (*a*).

and make, or order to be made a new one. Vide ante pag. 484, and post pl. 5, and 17. Carth. 464. S.C. Holt 508, 573. Vi. 5 Bur. 2634.

(*a*) *Vide* note to the case of the parish of St. *Leon, Shoreditch, ante* 483.

4. *Inter* THE INHABITANTS OF THE PARISH OF HARROW *and* RYSLIP (*b*).

[Mich. 10 W. 3, B. R.]

A. COMES into *Harrow*, and, being likely to become chargeable was removed to *Ryslip; Ryslip* appealed; and upon appeal, *A.* was adjudged to be settled at *Ryslip:* Afterwards *Ryslip* discovered that *Hendon* was the place of his last legal settlement, and sent him thither; and the question was, Whether, after the adjudication upon the appeal, *Ryslip* was not estopped against all the world to say, that *Ryslip* was not the place of his last legal settlement? *Et per Holt*, C. J. *Ryslip* is estopped to say otherwise; for if *Ryslip* had not been the very place of his last legal settlement, the justices must have sent him back to *Harrow*, who were first possessed of him, for that reason, because they were possessed of him and he did not belong to *Ryslip*. And now this is in effect the same question again, *viz.* Whether he belongs to *Ryslip?* which question has been already determined by the justices on the appeal, who have adjudged that he was last settled at *Ryslip*. Now this point being determined, the appeal must be final and conclusive, otherwise there would be no end of things; and the rather as to *Ryslip*, 1st, Because *Ryslip* was party to the suit wherein this determination was made, and yet *H.* may be estopped where he is not party to a suit; *per Holt*, C. J. who remembered the case of *Thornton* and *Pickering*, where it was adjudged that if *H.* be adjudged by two justices to be the father of a bastard child, he is estopped as to all mankind to say the contrary, and any man may call him so at his pleasure. The case was, A libel was exhibited in the ecclesiastical court for saying he had a bastard, and the defendant suggested for a prohibition this adjudication by the two justices; and the suggestion being turned into a declaration in an attachment on the prohibition, the defendant pleaded to it, that the

Confirmation upon appeal is final against all parishes, otherwise ot reversal. Vide ante pag. 486. pl. 45, &c. ib. & post pag. 527. 1 Vent. 310. Vide ante 492. 5 Mod. 416, 417. Set. and Rem. 184. S. C.

[525]

(*b*) *Q.* If this case should not be entitled *Hendon* and *Ryslip?*

words were spoken at large, without any relation to the adjudication by the justices. Plaintiff replied, and prayed judgment if he should not be estopped by the adjudication to say he had not a bastard.

2 Mod. 72. 10 Co. 101. 6 Mod. 287. Afterwards, *Hill.* 10., this was moved again, and then *Holt* and *Gould* held the adjudication was final as to *Ryslip* against all persons and places, because the point of his settlement as to *Ryslip* was tried in the appeal; but as to *Harrow*, (for he had formerly been removed by them to Ante 486. *Hendon*, and that order reversed,) they were at liberty to send him to any other place, and were not estopped; because the justices on the appeal did not adjudge him to be settled at *Harrow*, though they adjudged him now to be settled at *Ryslip*, so that the other point was not tried. *Turton* and *Rokeby contra. Adjournatur.*

5. ANONYMOUS.

[Hill. 10 Will. 3. B. R.]

A mandamus to compel precedent overseers to come to an account with the present quashed. Vide ante 484, and 524. Post, pl. 17, and 20. 5 Mod. 179, 420, 421. 6 Mod. 77, 97, 98.

A *MANDAMUS* was granted to the justices of peace on 43 *Eliz.*, commanding them to compel the precedent overseers of the poor of the parish of *A.* to come to an account with the present overseers, and this writ was now quashed: 1st, For that the account by 43 *Eliz.* is to be given to two justices, and not to the succeeding overseers (*a*). 2dly, Two of the persons named in the writ, whom the justices were to compel to come to account, do not appear to have been overseers.

(*a*) *Vide* stat. 17 *G.* 2. c. 38.

6. *Inter* THE PARISHES OF BECKENHAM *and* CAMBERWELL.

[Trin. 5 Will. 3. B. R.]

Unmarried person hired for a ar. Set. and :m. 180. S. C. [526] Vi. post, pl. 11. and pl. 13.

A QUESTION was made upon 8 & 9 *W.* 3. *c.* 3., which enacts, that an unmarried person, hired for a year, shall not be settled, unless he serves the whole year, whether that extended only to cases that might happen after the act, or to such also as had happened? *Et per Cur.* To such only as may happen after the act: It can have no retrospect, but declares a law for the future, notwithstanding the words *declared and enacted*. Adjudged upon a special order.

7. ANONYMOUS.

[Hill. 11 Will. 3. B. R.]

IF *H.* being settled at *A.*, becomes afterwards a vagrant, some justices have thought that to be a determination of the settlement; but I never could think so; for if *H.* be found a vagrant within 39 *Eliz. c.* 24., he may be sent to the place of his birth; but then by 43 *Eliz. c.* 2. he may be sent from thence as a poor person to the place of his last legal settlement; for his being sent to the place of his birth, satisfies the statute of 39 *Eliz.*, and so both the statutes stand together. *Per Holt*, C. J.

Vagrant to be sent to the place of his birth, and from thence by order, to the place of his settlement.

8. DOMINUS REX *v.* THE INHABITANTS OF AUDLY.

[Mich. 12 Will. 3. B. R.]

AN order of sessions made upon an appeal from a poor's rate, being removed into this Court by *certiorari*, the case was, on *Sept.* 1, 1665, a certain rate was agreed to by the inhabitants of the parish of *Audly*, which had been followed ever since till the last year, when a new rate was made. Upon appeal to the sessions the new rate was quashed, and the old one ordered to stand. And now it was objected, that it did not appear this was a poor's rate, being called a *parish-levy*, which might be as well for the church as the poor, and then the justices had no jurisdiction. *Darnel*, The Court will intend it. *Holt*, C. J. *Twisden* used to say, If a particular jurisdiction does not shew the matter to be within its authority, it must be taken to be out of it. Mr. *Parker* took another exception, *viz.* that the whole rate could not be quashed at the complaint of one man; and also that the old rate, however just at first, might be unequal now, and therefore the justices could not make a standing rate; which last *fuit concessum per Holt*, C. J. for lands may be improved. By 43 *Eliz.* the rate must be equal; *ergo* it ought to be continually altered, as circumstances alter. The justices could not confirm an old rate, and in this their order is naught. And by him it was said in this case, that though the justices at sessions need not give a reason for their order, yet if they give a reason which is wrong, we must be guided by it, and quash the order, because it appears to us to be no reason.

A standing rate cannot be made, but must be varied by circumstances. Holt 576. S. C.

9. *Inter* THE INHABITANTS OF MYNTON *and* STONY STRATFORD.

[Mich. 13 Will. 3. B. R.]

Reversal on appeal is final only between the parties, but confirmation is conclusive against all the world. Vi. ante p. 486, &c. ib. & p. 524. 1 Vent. 310. Vide ante 492, 524. 5 Mod. 417. 6 Mod. 269, 287. Cases B. R. 668. S.C. 3 Salk. 260. Set. and Rem. 228. Holt 577.

BY order of the justices a poor person was sent to *Mynton: Mynton* appealed to the sessions, and the order was discharged; and then by order the person was sent to *Stony Stratford*, who appealed, and the order was confirmed; and then by another order the person was sent back to *Mynton*. *Et per Curiam*, The last order to send him to *Mynton* was illegal. *Per Holt*, C. J. If on appeal to the sessions an order be discharged, that judgment binds only between the parties. But when upon an appeal an order is confirmed, that is conclusive to all persons as well as to the parties, for it is an adjudication that this is the place of the party's last legal settlement, which cannot be avoided by the parish against whom it is made. It was also held, that a parish in reputation is liable, if there be officers, *i. e.* churchwardens.

10. ANONYMOUS.

[Pasch. 1 Ann. B. R.]

Hospital lands are chargeable to the poor. Vide Cowp. 85. Cald. 153. 4 Bur. 2455.

HOSPITAL *lands* are chargeable to the poor as well as others; for no man, by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burden upon their neighbours. *Per Holt*, C. J. (*a*)

(*a*) *R.* 2 *Bur.* 1064. That St. *Luke*'s Hospital for poor lunatics was not rateable, as the rate must either be made upon the trustees, who were merely nominal; the servants, who were merely hired attendants, and had no possessory right or interest; or upon the objects of the charity; any of which cases would be absurd. And there being no person rateable, it was held by necessary consequence that there could be no rate. *Vide* also 4 *Bur.* 2439.

Post. pl. 13. S.C. Set. and Rem. 181. Holt 577.

11. *Inter* THE PARISHES OF FARRINGDON *in* BERKS *and* WITTY *in* OXFORDSHIRE.

[Pasch. 1 Ann. B. R.]

Unmarried person hired for a year, marrying before the year is expired, cannot be removed, and performing the service, gains

A SERVANT came into the parish of *S.* was hired for a year, and having served half a year of the time, married a woman in the parish of *Witty;* and the question was, 1st, Whether the justices, on complaint of the churchwardens, could make an order to remove him to

the place of his last legal settlement? 2dly, Whether his serving here would not gain a settlement? To the first point it was admitted, that the contract between the master and servant was not dissolved by the marriage; and that, admitting it might be dissolved by an order made on complaint of the master (*a*), yet, without that, and upon complaint of the officers only, it could not be dissolved; therefore *Broderick* (of counsel) admitted that the justices could not in the principal case so remove him, as that he could not come to serve his master, but held he might be removed, so as that the order should disturb him, and prevent a settlement; and this he said was a *medium* that would neither prejudice the contract, nor evade the statute. He compared it to an order to remove on 14 *Car.* 2. before forty days stay; in which case the very making of the order obstructed a settlement; and it may be executed after the forty days. *Holt*, C. J. and *Powell contra*, That an order to disturb him and not remove him, was not within the meaning of the act; disturbing him, without power to remove, is vain; and this does not unsettle, nor is it like the case of forty days. 2dly, It was questioned, Whether such a stay, *&c.* would gain a settlement; because the statute make the party's being unmarried a qualification as well as his stay, *viz.* If any such person, *being unmarried*, *being hired*, *&c. such service*, *&c.* So that the words *such service* goes to all, not only the stay, but the state of the party. To this *Powell* inclined; *Holt*, C. J. *contra*, *Such* is only *such service*, and the marriage does not hinder the service; the contract continues; and suppose the woman he marries be of the same parish, shall not that gain a settlement?

a settlement. Vide ante, pl. 6. 3 T. R. 382. Post, pl. 13. 2 Bur. S. C. 455. 1 Fol. 148. Sess. Ca. 133.

[528]

(*a*) *R. Bur. S. C.* 322. That a justice cannot, on complaint of a master, discharge a servant for marrying.

12. *Inter* THE INHABITANTS OF THE PARISHES OF CUMNER *and* MILTON IN THE COUNTY OF BERKS.

[Trin. 2 Ann. B. R. S. C. Fortesc. 322.]

UPON a special order of sessions, the case was, *H.* was settled at *Cumner*, and had several children born there: Afterwards he removed to *Milton*, and gained a settlement there, by renting a tenement of the value of 10*l. per annum.* He became poor, and his children, under the age of seven years, were sent back to *Cumner*, by order of two justices, which was confirmed at the sessions. *Powell*, J. held, that when a child is sent with the parents by reason of nurture, it gains no settlement; but here the

Father settled at A. removes to B. with his children, and gains a new settlement there, and so do the children, though under the age of seven years. Vide ante 427, 470. Comb. 380, 381. 3 Salk. 252.

S. C. 6 Mod. 87. Holt 578. Set. and Rem. 239, 242.

children did not come to *Milton* by order. The children's settlement shall not be divided from the father, for that would be unnatural. When a man gains a settlement for himself, his wife, and servants, he shall gain a settlement for his children also; but if a widow, having children under the age of seven years, marries a man of another parish, the children shall go with the mother for nurture, but after seven years of age they shall be sent back to the parish, where their father was settled, for she cannot gain a settlement for them in this last parish, being under coverture, and having a settlement there herself only as part of her husband's family, from whom she cannot be severed (*a*). *Holt*, C. J. Birth is a settlement, and the first settlement; and there must be another second settlement by forty days, *&c.*, to alter the primary settlement. A child under the age of seven years is accounted a nurse-child. If a child be put out to nurse, or for education, though it

[529]

be above seven years old, it gains no settlement thereby, as it was held in Sir *Paul Jenkinson's* case. The question here is, Whether the first settlement by birth be altered? It is hard, I confess, to remove the child from the father. *Gould*, J. The child may be removed after the age of seven years, but not before; he is sent with his father for nurture only. *Holt*, C. J. Suppose the father and mother come to *A.*, and then go the parish of *B.*, and within forty days the mother be delivered of a child; the child, though legitimate, shall be settled where it was born. The principal case is fit to be well considered; the father indeed ought to maintain his children, but the question is, Whether the children, by living with the father, gain a settlement? The justices cannot remove the children from the father till he fall to decay. Afterwards this was moved again. *Et per Holt*, C. J. The question is, When the father comes with his children to *Milton*, and gains a settlement there, whether that does not also give a new settlement to his children, and unsettle them as to *Cumner*, the place of their birth? If a father be settled and die, his wife being big with child, and after that the mother dies before she is delivered, and afterwards the child is born, the child is settled there by his birth (*b*). In this case the settlement of the father at *Milton*, is a settlement to the children. The child is settled by birth only, where it is an accidental settlement (*c*). The order was quashed (*d*).

(*a*) *R. acc. Carth.* 449. 2 *Bott.* 3d edit. 34.

(*b*) *Rex* v. *Clifton,* 19 *Vin.* 382. If the father die before the child is born, yet the child shall be settled where the father was settled before his death.

(*c*) *Vide Foley* 313.

(*d*) *R. acc. Foley* 257. *And.* 345. *Vide Set.* and *Rem.* 17. *Str.* 580. Ld. *Raym.* 1474.

13. *Inter* THE PARISHES OF FARRINGDON *and* WILCOT. Ante, pl. 11. S. C.

[Pasch. 2 Ann. B. R.]

Unmarried person hired for a year, marrying before the year expired, but performing the service, gains a settlement. Vide ante, pl. 6, and 11. S. C.

H. BEING single, was hired for a year; after he had served three quarters of the year, he married, and the justices removed him to his place of last legal settlement. *Et per Cur.* The contract being good, the justices have no power to remove him from his master before the end of the year; for they cannot annul the agreement between master and servant, unless it be upon complaint of the master (*a*). Settled or not settled, was not before the Court. But as to that, *viz.* whether such person serving out the year would gain a settlement? *Holt* and *Gould* held, the word *unmarried* went only to the hiring (*b*). *Powell contra*, that it went to the whole service, by reason of the word *such.*

(*a*) Nor upon such complaint, *Bur. Set. Ca.* 322.

(*b*) *R. acc. Foley* 148. *Sess. Ca.* 143.

14. *Inter* THE PARISHES OF LITTLE-KIRE *and* WOOLFALL. [530]

[Trin. 2 Ann. B. R.]

Certificate-man is not removeable till actually chargeable. Vide infra.

A PARISHIONER of the parish of *A.* came to *B.* with a certificate, according to the late act of parliament; and the justices reciting that matter, and because he was likely to become chargeable to *B.*, sent him back to *A.* *Winnington* moved to quash the order, because he is not removeable till he is actually chargeable by the express words of the act 8 & 9 *W.* 3. *c.* 30. *Et per totam Curiam* the order was quashed, *nisi.* Mr. *Broderick* agreed the exception, but said the reason of the removal was, because the certificate was wrong, and that the sessions have authority in this matter; for an appeal lies to them within the equity of 14 *Car.* 2., where a certificate is made and signed by two justices. *Powell*, J. *contra*, If there was a fault in the certificate, it ought to appear to be the reason why he was sent back, and the justices at sessions have not a jurisdiction by way of appeal upon such a certificate. Vi. 3 T. R. 48. Bur. S. C. 392. Sayer 287.

15. *Inter* THE INHABITANTS OF MALDEN *and* FLETWICK.

[Trin. 2 Ann. B. R.]

Order of removal of certificate-man must adjudge him to be actually chargeable, ut supra.

AN order was made reciting, That whereas complaint has been made unto us by the, *&c.*, that *J. S.* who is lately come into the parish of, *&c.* with a certificate according to 8 & 9 *W.* 3., is actually chargeable to the parish, and quashed; for the justices must adjudge him to be chargeable, or at least must say it appeared to them that he was so; but the justices need not adjudge the place that gives the certificate to be the place of his last legal settlement.

16. *Inter* THE PARISHES OF ALL-SAINTS *and* ST. GILES IN NORTHAMPTON.

[Trin. 1 Ann. B. R.]

Certificate concludes the parish giving it, only against the parish to which it is given. Vide post 535. Case of Honiton contra. Holt 578. S. C

UPON an appeal a special order was made, and the case was; One was born at *A.* and came and lived at *B.* some years, but never gained any settlement there; then he removed to *C.* for convenience of getting his livelihood, and *B.* gave him a certificate according to the late act. The man became chargeable, and was sent back to *B.*, who found that he was last legally settled at *A.*, and sent him thither. *Et per Holt*, C. J. The reason of the act of parliament about certificates was only to encourage parishes where poor persons were minded to go, to receive

[531]

them; and therefore it enacts, that when the poor person shall be chargeable, the parish which gave the certificate shall receive and provide for him as a settled inhabitant, which words lay an obligation upon the parish which gave him the certificate to receive and provide for him against that parish which they gave the certificate to. But as to all other parishes, they are as they were before (*a*), for the conclusion is only by reason of the words of the act of parliament, which extend only to the parish to which he was sent; by consequence the conclusion can extend no farther. *Powell*, J. This way of giving certificates was a thing commonly practised before this act of parliament, and it was made only to oblige the parish who gave the certificate to receive him again of the other parish to which the certificate was given: But the intent of that was not to make a new settlement which was not before. But *per*

(*a*) *R. acc.* 4 *T. R.* 251. *Vide Say.* 231. *Bur. S. C.* 373, 381.

Holt, C. J. Such certificate is a mighty evidence before the justices; and so is a demand and refusal of a conversion, which yet being specially found, will not be a conversion.

17. TAWNY'S *CASE.*

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1009. S. C.]

TAWNY being overseer of the poor of *Little Port* in the isle of *Ely*, laid out his money in the relief of the poor, and was turned out of his office by the justices, before the end of the year, by which means he lost the opportunity of making a rate to reimburse himself: Upon this he obtained a *mandamus* directed to the churchwardens and overseers of the poor, to make a rate to reimburse him; Mr. *Parker* and Mr. *Eyre* argued, that there could be no such charge, neither by common law nor by the statute 43 *Eliz.* *Et per Holt*, C. J. We cannot order the parish or overseers by a *mandamus* to make a rate to raise money to reimburse an overseer, but only to raise money for the relief of the poor, nor can they make a rate otherwise (*a*): The act of parliament is expressly so, and must be pursued. An overseer is not bound to lay out money till he has it; if he does he must make a new rate for the relief of the poor, and out of that he may retain to pay himself: *Tawny* should have done so; he trusted where he needed not have done it: he has not pursued the means the statute gave him, and we cannot relieve him. *Et per tot. Curiam*, The *mandamus* lies not; *ideo cassetur.* *Et nota per Cur.* The churchwardens and overseers may make a rate of themselves. *Weld* and *P[illegible]e pro le mandamus.*

No mandamus lies to the overseers to make a rate to reimburse former overseers Vide pag. 484. and ante pl. 5. 5 Mod. 179. 6 Mod. 97. S. C. 3 Salk. 232. Cases L. E. 104. Holt 579. Rate must be for the relief of the poor Ante pl. 3.

(*a*) *R. Doug*. 116. on the authority of this case, That a rate cannot be made to repay money borrowed to repair or rebuild a workhouse. *Vide Foley* 10. 1 *Bott.* 3d edit. 272. *Foley* 33.

18. *Inter* THE PARISHES OF WESTBURY *and* COSTON. [532]

[Hill. 2 Ann. B. R.]

A WOMAN big with child was removed by order of the justices from *Westbury* to *Coston*, and, pending the order, before the next quarter-sessions, she was delivered of a bastard-child. *Coston* appealed, and thereupon the order of the two justices was reversed; but the child was sent back to *Coston*, as the place of its birth. *Et per Holt*, C. J. Though here be no fraud, here was a wrongful re-

Bastard born at A. pending an order of removal from B. afterwards reversed, is settled at B. Vide ante 427, 474, 485, and 528.

moval, and the reversal makes all void *ab initio*. Fraud, or not fraud, is not material in this case; but the settlement of the child depends upon the removal, for if that was wrong, they shall not ease themselves by it.

19. TRACY *v.* TALBOT.

[Trin. 3 Ann. *Coram* Holt, *C. J. at* nisi prius.]

Assessments for the poor ought to be raised monthly. 6 Mod. 214. S. C. 3 Salk. 260. Set. and Rem. 235. Holt 581.

H. TOOK part of a house in the parish of *D.* on the 3d day of *Decemb.*, and was rated as an inhabitant, and was distrained for a quarter's rate the *Christmas* following; but the distress was taken before *Christmas* on a general warrant made for the whole year; and in *replevin* upon evidence it was ruled *per Holt*, C. J. 1st, That if two several houses are inhabited by several families, who make and have but one common avenue or entrance for both: yet in respect of their original, both houses continue rateable severally, for they were at first several houses; and if one family goes, one house is vacant: But if one tenement be divided by a partition, and inhabited by different families, *viz.* the owner in one, and a stranger in another, these are several tenements severally rateable, while they are thus severally inhabited; but if the stranger and his family go away, it becomes one tenement. 2dly, That *H.* could not be rated for the whole quarter, for poor's rates are to be assessed monthly by the statute; and by this means a man cannot move in the middle of a quarter, but he must be twice charged (*a*). 3dly, That *H.* could not be distrained by virtue of the general warrant made before the rate; but there ought to be a special warrant on purpose. 4thly, That a distress could not be taken for a quarter's rate before the quarter was ended (*b*); but the jury said the custom was otherwise.

(*a*) *Vide* 6 *Mod.* 97. 8 *Mod.* 10. 17 *G.* 2. *c.* 38. *s.* 12. 2 *Bur.* 1152. 2 *Bl. Rep.* 694. Stat. (*b*) *R. contr.* 1 *Bott.* 3d edit. 207.

[533]

20. DOMINA REGINA *v.* HEDGES.

[Mich. 4 Ann. B. R.]

Upon appeal from allowance of overseer's accounts, sessions must execute their judgment in the same manner as two justices ought to

AN order was made at the quarter-sessions upon appeal: The case was, *Hedges*, an overseer of the poor, accounted before two justices, and this account was allowed; the parish appealed to the quarter-sessions from this allowance, and they disallowed the account, and ordered him to pay so much over, which they adjudged to be in his hands; and for not doing this, they committed him. Mr.

Eyre moved to quash this order, because by 43 *Eliz. c.* 2. *sect.* 4. they should have levied the arrears by distress and sale, and in default of distress have committed him: And the whole Court agreed, that the justices at the sessions upon the appeal must execute their judgment in the same manner as the two justices must do, and that the two justices must have sent their process to distrain, and upon a return to that, that there was no distress, should have committed him. Then *Darnel* moved that it might be only quashed as to this part; *quod fuit concessum per Cur.* Then Mr. *Eyre* objected to that, *viz.* that the first order, as recited in the order of appeal for the allowance of the account, was not by two justices *quorum unus; sed non allocatur:* We cannot judge of that upon a recital, so as that you may take advantage of it; you must bring in that order by *certiorari.*

do. Vide ante 525. pl. 5, &c. ib. & 6 Mod. 77, 97.

Vide St. 17 G. 2. c. 38. s. 2.

21. *Inter* THE PARISHES OF ST. BRIDE'*S and* ST. SAVIOUR'*S.*

[Hill. 4 Ann. B. R.]

A POOR person was sent from *St. Bride*'s in *London* to *St. Saviour*'s in *Southwark*, and upon an appeal a special order was made: The case was, *B.* was bound apprentice for four years to *J. S.* and lived out these four years at *St. Bride*'s with him; *J. S.* was only a lodger and had no settlement there. And the Court held the apprentice was well settled in *St. Bride*'s, for he was not a person removeable, nor does his settlement depend on his master, as that of a wife on her husband for a settlement; but he gains a settlement for himself (*a*) within 14 *Car.* 2. by forty days inhabitation, and so of a hired servant; but the matter went off upon another exception.

Apprentice may gain a settlement, though the master has none. Ante 497. pl. 28. S. C. Set. and Rem. 87.

(*a*) *R. acc. Foley* 150, 152. *Set.* and *Rem.* 65. 2 *Bott.* 3d edit. 564.

22. JENKIN'*S CASE.* [534]

[Pasch. 5 Ann. B. R.]

AN order of sessions was made, that the defendant should pay 2*s. per* week towards the support of his father, till that Court should order the contrary; which was held good, because it was indefinite and no set time limited; and if an estate happened to fall to him, they might apply to the justices; otherwise if a time was limited.

Order to relieve his father till sessions order the contrary, good.

23. DOMINA REGINA v. THE INHABITANTS OF BUCKINGHAM.

[Pasch. 5 Ann. B. R.]

Nothing makes a settlement within 3 & 4 W. & M. that is not within the very words. Vide ante 478, 523, 524. post. 536. 1 Show. 12. Comber. 282. 5 Mod. 330, 331, 451. S. C. Holt 582. Set. and Rem. 143.

A SPECIAL order was made, wherein the case was; *H.* being a poor person went to *Buckingham*, where he took part of a house of *W. T.* at 3*l.* *per annum*, and insisted when he took this apartment, that he would pay no taxes for it, but that the lessor should; this was agreed to, his rent being the more and the greater upon that account: This appeared upon evidence, and also that this apartment before the taking, and while he continued in it, was distinct from the rest of the house without communication, and was taxed as a house of itself, and that the tax was laid upon *W. T.* the lessor; and that while *H.* lived there he took his freedom in the corporation, and once voted as a freeman at the election of bailiffs for the corporation. The justices at the quarter-sessions adjudged this to be a good settlement: But upon the motion of serjeant *Broderick* it was quashed: He insisted that since the explanatory act 3 & 4 *W.* & *M.* nothing makes a settlement within that statute that comes not within the words; an explanatory act implying a negative of any thing else. *Et per Holt*, C. J. and *Powell*, J. Coming into a parish, and being taxed by the parish, made a good settlement without a notice in writing, within the statute *Jac.* 2. But the law is altered by 3 & 4 *W.* & *M.*, and as to his voting they could not take notice that that implied a settlement; for a bare residence might by the constitution of the corporation entitle him to that, and his voting was an act that related to the corporation, and not to the parish.

Foley 110, 123. Str. 825. 2 Bott. 3d ed. 125.

[535]

24. *Inter* THE INHABITANTS OF THE PARISH OF DUNSFOLD *and* RIDGWICK.

[Mich. 9 Ann. B. R.]

Two several hirings for half a year, and service for a year, not sufficient to gain a settlement. Black. 191. S. C.

IT APPEARED by a special order, that one was hired as a servant to live at *Ridgwick* for half a year, and after that was hired again to live there for another half year with the same person, and thereupon served a year in one continued entire service, but by several hirings. Sir *Peter King* urged, that here was a service for a year, and a hiring for a year, though by several contracts; and that the hiring need not be by one entire contract, and that so it had been held; and he cited a case where *H.* took a tenement of 5*l.* a year, and also another tenement of 5*l.* a

year, and occupied both, and this was held to be a renting of a tenement of 10*l. per annum*. *Et per Cur.* it ought to be one entire contract, and one entire service; the one is required by the statute as well as the other. If a service under several contracts shall gain a settlement; one that serves by the month, by the week, or by the day, may, if he continues a year, gain a settlement; one may hire by the day for charity; but there is danger of being chargeable in hiring such a person by the year: For such a term as a year it is not supposed a master would hire one, unless able of body, and so a person not likely to become chargeable. Also the Chief Justice observed, that by the statute of *Eliz.*, the retainer of servants was for a year; that 14 *Car.* 2. requires forty days stay, and that this was inconvenient, for by gaining a settlement in forty days, servants grew insolent; and that these latter acts, *viz.* 3 & 4 *W.* 3. *c.* 11., 8 & 9 *W.* 3. *c.* 30., do but turn the forty days service into a year's service, and the hiring to be a retainer for a year (*a*) according to the statute of *Eliz.*

(*a*) *R. acc.* 1 *Str.* 83. *Foley* 137. *Cald.* 133.

25. *Inter* THE INHABITANTS OF THE PARISH OF HONITON *and* ST. MARY-AXE. Vide ante 530 con.

[Mich. 9 Ann. B. R.]

H. CAME to *Honiton* with a certificate from the parish of *A.*; after this he went to the parish of *B.*; and now being sent to the parish of *A.*, the said parish offered to prove that he was settled at the parish of *St. Mary-Axe;* and the question was, Whether *A.* was bound by the certificate as to *Honiton* only, or concluded as to all parishes whatsoever? *Et per Cur.* Before the statute a certificate was only an evidence of a private undertaking between the parishes, in the nature of a contract; but now it is a solemn acknowledgment, like the conuzance of a fine; and thereby the party is owned to be legally settled there, and that they will provide for him; and as all other parishes on this certificate are bound to receive him, so the parish that certifies is concluded as to all other parishes. And there is no reason why it should differ from an adjudication, since this is the acknowledgment of the parish signed by the proper officers, and made before two justices of peace, who are proper judges, and upon less evidence could have adjudged it a settlement, by which sentence all parties would be bound, and there is no remedy but to repeal it.

Certificate concludes the parish giving it, as to all the world. Black. 192. S.C Cases L. E. 9. Vide the Case of St. Giles's in Northampton, ante pl. 16. contra.

[536]

R. contra 4 T. R. 251.

26. *Inter* THE PARISHES OF EVELIN IN OXFORDSHIRE *and* RENTCOMB IN GLOUCESTERSHIRE.

[Hill. 10 Ann. B. R.]

Renting a mill of 10l. per annum gains a settlement. Vide ante 492, 524. 1 Show. 12. Farcsl. 54. 5 Mod. 419.

AN order was drawn up specially to have the opinion of the Court, Whether renting of a water-mill of 10*l. per annum* would make a settlement? *Et per totam Curiam* clearly, A mill is a tenement, and the renting thereof must gain a settlement within the statute (*a*).

(*a*) *R. similiter* as to a windmill, *Bur. S. C.* 107. 2 *Str.* 1077.

27. *Inter* THE PARISHES OF GATTON *and* MILWICH.

[Hill. 10 Ann. B. R. S. C. Foley 123.]

Parish clerk nominated by the parson is in for life, and gains a settlement. Vide ante 478, 523. 1 Show. 12. Shaw. P. L. 223. S. C. Set. and Rem. 158.

AN order was drawn up specially for the opinion of the Court; and the question was, Whether one appointed clerk of the parish by the parson, and executing the office for a year, should gain a legal settlement within 3 & 4 *W. & M.*, of which the words are, *viz. shall execute any annual office or charge?* For it was objected, that this was not an annual office. Mr. *Lechmere contra:* The intent of the act was, that no office under an annual one should gain a settlement, and *majus continet in se minus.* On the general nomination to the office of parish-clerk he is in for life. *Powell*, J. His being put in by the parson makes no difference, no more than where the constable is put in by the leet, and not by the parish; it is more than an annual office, he is not removeable, and has fees. *Eyre*, J. He is but a servant to the person at will: Where he comes in by election, he has an estate for life by the custom, but here is no deed or writing: How can he have an estate for life in this office? *Powell*, J. At that rate he has not an office at will, for a man cannot have an office at will without deed. The office of churchwarden was by common law, and yet that is for a year without any deed or writing. So it is of a parish-clerk, he is by common law an officer, and is in for life without deed; so ruled, *absente Parker*, C. J.

Str. 942.

POWERS.

Lutw. 1464. 4 Mod. 265. 1 Mod. 318. 6 Co. 33. 8 Co. 70. 4 Co. 70. S. C. 5 Mod. 244, 245, 378, &c. Vide 6 Mod. 20. Cases B. R. 147. Holt 414.

1. WINTER *v.* LOVEDORE.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 267. S. C. Comyns 37. S. C.]

Power to demise any lands, except the demesne lands of the manor. Copyholds are within the exception. Vide Ray. 132. Pop. 9. Yelv. 222. Moor 494. 2 Lev. 60, 149, 150. 1 Lev. 150, 241. Carth. 427. S. C. 1 Inst. 54. Comb. 371.

IN *ejectment* a special verdict was found, that *G. P.* was seised of the manor of *M.*, and on the marriage of his son, settled the said manor to the use of himself for life, remainder to his wife for life, remainder to his son in tail, with a *proviso*, that he should have power during his life, and so the wife after him, to demise the premises in possession, for one, two, or three lives, or in reversion for one, two, or three lives, or thirty years, or for any number of years determinable on one, two, or three lives, so as such demise be not of the demesne lands. *G. P.* reciting that *J. S.* and his wife held a copyhold tenement for life, demised the said copyhold tenement to the lessee for thirty years, to begin after the death, surrender, or forfeiture of *J. S.* and his wife; and the question being, Whether this lease of a copyhold was pursuant to, and warranted by the power? it was held in this case by *Holt*, C. J.

1 Lev. 168. 8 Mod. 251. 5 Mod. 381. If a man hath a power to make leases in possession or reversion, he cannot do both.

1st, That any lease, to commence *in futuro*, is in some sense a lease in reversion, as it is opposed to a lease in possession; but a lease within such a power must be construed of a lease to commence in possession after another lease or interest already created before the reservation of the power, and not after; and that a lease to commence after any other lease, is properly a lease in reversion; but that a lease for life, to commence after another lease in being, is a concurrent lease; because a freehold cannot expect, but must commence in possession presently; however, this may be said to be a lease in reversion within such powers.

2dly, That *G. P.* might make a lease in reversion absolutely for thirty years, by virtue of this power, because the limitations and restrictions are disjoined, and the latter part is carried on by way of enlargement of the power; to which *Turton* and *Eyre* agreed, *Rokeby dissentiente.*

3dly, That this lease was void, because it was of copyhold lands; for by a grant of the demesnes the copyholds will pass; and by the same reason, by excepting the demesnes the copyholds are excepted; and the rather, be- [538]

cause the power is derived out of the inheritance, and the tenant at will by his leases might destroy the copyhold, which is unreasonable; and if there were nothing else for the power to work upon in this case, he may by virtue thereof demise the rents and services.

2. LORD KILMURRY *contra* GEERY.

[Pasch. 12 Ann. In Canc.]

Power to charge lands with a sum of money, imports interest thereof also. Vide Chan. Rep. 18, 23, 281, 363, &c. Eq. Ab. 341. p. 4. S. C. Vi. 1 Lev. 151. Hard. 398.

IT was held, That if a man has power to charge land with any sum not exceeding the sum of 3000 *l.* he may charge it with 3000 *l.* and the interest besides; for the intention is to charge the premises with 3000 *l.* principal money, and that of course carries interest, and none would lend such sum on such security, if the law were otherwise (*a*).

(*a*) *Vide acc.* 2 *Wms.* 591. 2 *Atk.* 358.

PRESCRIPTION.

Star *v.* Rookesby. Mich. 9 Ann. B. R. Vide *title* Fences, vol. 1. *page* 335.

[539]

Vide Hob. 302. 3 Leon. 47. 6 Co. 57. 1 Leon. 230. 2 And. 49. Cro. El. 518. 3 Lev. 313. S. C. 4 Mod. 134. 2 Lutw. 1094. Parliament Cases 88. Nel. Lutw. 348. Carth. 311. Holt 609.

PRESENTATION, ADMISSION, INSTITUTION, INDUCTION.

1. HELE *v.* THE BISHOP OF EXETER.

[Mich. 3 W. & M. B. R.]

Where the ordinary refuses quia insufficiens in literatura, he must shew in what particular. Vide 5 Co. 57,

IN *quare impedit* the bishop pleaded, That the church became vacant on the 15th day of *April*, and that the plaintiff presented to him on the 19th day of *May* following one *Hodder*: that he examined *Hodder*, and found him *personam minus sufficien. in literatura, ac ea ratione fore*

personam inhabilem & minime idoneam ad habend. beneficium cum cura animarum, and therefore refused him on the 20th day of *June*, and gave the plaintiff notice; and because no other was presented within six months after the avoidance, he collated the other defendant (the incumbent) who was instituted. The incumbent pleaded to the same effect. The plaintiff replied, that *Hodder*, at the time of his presentation, was vicar of another church; that he was *homo literatus*, and in priest's orders; that he was licensed to preach, and had celebrated divine service many years, and was *sufficienter literatus* to celebrate the same. There was a rejoinder and surrejoinder, (which were laid out of the case,) and thereupon a demurrer. *Et per Cur.*, 1st, The ordinary must examine in convenient time, and after that refuse in convenient time; if he does not, he is a disturber by his delay. 2dly, If the ordinary refuse, *quia criminosus*, he need not give notice of his refusal, for the crime is as much in the conusance of the patron as of the bishop, and in that case the lapse shall incur from the avoidance; but if he refuse, *quia illiteratus*, he must give personal notice, and the lapse shall incur from the refusal.. 3 *Cro*. 119. 1 *Lev*. 31. *Dy*. 327. 2 *Ro*. 364. 3dly, That the ordinary might well refuse him now, as unfit for this cure, though he had been allowed for a former. 4thly, It was not determined what learning was necessary. While the liturgy was in *Latin*, that language was undoubtedly necessary; now indeed the liturgy is in *English*. But it was observed that 13 *Eliz*. c. 12. requires a clerk should be able to answer his ordinary, and give an account of his faith in *Latin*, according to the Articles. 5thly, The Court held this pleading too general, because it was not shewn what learning he was defective in; whereas it ought to be certain, because it is traversable; and if the clerk die, to be tried by a jury, and the king's courts to judge of it; and the law will the rather require a certainty, because this answer is to disable a man in his profession, and prevent him of a freehold. Judgment was given for the plaintiff, which was reversed upon a writ of error in parliament. [*Parliament Cases* 88 to 104. This judgment reversed in the House of Lords.]

58. 1 And. 189, 190. 3 Leon. 198, 199, &c. Cro. El. 242. Hob. 296. Carth. 311. 2 Lutw. 1094, &c. 2 Inst. 622.

Ordinary may examine and refuse; but it must be in convenient time.

Must give notice of his refusal, if it be quia illiteratus; secus if criminosus. Vide Com. 359. 2 Inst. 632. 1 Burn. E. L. 142. Cro. El. 119.

[540]

2 Inst. 632.

3 Lev. 214

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2. DOMINUS REX & DOMINA REGINA v. THE BISHOP OF LONDON and DR. BIRCH.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. 23. S. C.]

S. C. 3 Lev. 382, &c. 4 Mod. 190. 1 Show. 501, 441, 493, 413. Comb. 301. Holt 585.

IN a *quare impedit* against the bishop of *London* and *Dr. Birch*, for hindering to present to the parish-church of St. *James*'s, the declaration set forth, That St. *Martin*'s *in the Fields* being a great parish, an act of parliament was made

Where a new advowson is created by statute, it is subject to the same rules of

law and prerogatives of the crown as an old one. Ca. Parl. 170.

1 *Jac.* 2. to take the parish of St. *James* out of it, and make it a parish of itself with cure of souls, and Dr. *Tennison*, who was then vicar of St. *Martin*'s, the first rector; and appointing the patronage, after the death of Dr. *Tennison*, to the bishop of *London* and his successors, and the Lord *Jermyn* and his heirs alternately: *Virtute cujus* Dr. *Tennison* was first rector, and being so, was afterwards made bishop of *Lincoln;* whereupon it belonged to the king and queen to present by prerogative. To this the bishop demurred, and Dr. *Birch* pleaded the statute of 25 *H.* 8. and that by virtue of the said act, the archbishop of *Canterbury* gave Dr. *Tennison* a dispensation to hold his church *in commendam;* which the king confirmed, from the 22d day of *October* till the 1st of *July* following, *&c.* To this the attorney-general demurred. 1st, It was objected for the defendant that this prerogative was unreasonable; but the Court answered, that since the king made the church void, it was no hard matter that he should be allowed to fill it; and the patron was not much hurt, for it was only one life exchanged for another; and Sir *Giles Eyre* held, that if a parson be promoted to a bishop, the church was void by the common law; but the reason of it was not from the incompatibility, because originally the bishop was incumbent of the whole diocese, and served the cure by others; and the Court did admit that the Crown did not anciently exercise this prerogative, but the pope did by usurpation; and that notwithstanding the statute of provisors, 25 *E.* 3. the pope would collate if the incumbent was made a bishop, 3 *E.* 3, 5. *Owen* 144. Then 7 *H.* 7. *c.* 8. was made against provisions; but notwithstanding that the pope went on. *Vide Cotton* 458. *Mo.* 399. 3 *Cro.* 5, 6. *Owen* 144. *Win.* 94. 2 *Cro.* 691. *Dy.* 228., which was but a sudden opinion.

Vide Vaug. 18. Str. 837. El. Rep. 770. 3 Wils. 221.

2 Wils. 182. Before the Reformation the pope presented upon promotion of the incumbent.

[541]

2dly, They held, That the king's turn was not served by the confirming the *commendam;* for the dispensation was only to save the avoidance, and the confirmation continued the possession, but transferred no right.

Vide Str. 1006. Hob. 143. Dyer 233. a. b. in marg. Hob. 289. 5 Co. 24. 11 Rep. 67.

3dly, This being a new patronage created by act of parliament, not in *esse* before, which appoints a particular person to have the first turn after the next avoidance; it was objected, that nobody could say the king should present, when the act said otherwise; and this was therefore a case exempt from the prerogative: But the Court held, that the act did not interfere with the prerogative. If an estate-tail is created by act of parliament, it is subject to such bars as other lands intailed are. The wife shall be endowed of a new estate. *Vide* 8 *Co.* the *Prince*'s Case; *a pari ratione* a new rectory shall be subject to the king's prerogative.

4thly, It was objected, That this new church, as to Dr. *Tennison*, was a kind of donative, he coming in without institution and induction, and that the presentable parsonage does not commence till after him, by the words of the statute; and that in case of a donative, the promotion of the incumbent does not make a cession.

Sed Curia contra: For in point of estate, the right of presentation commences by the passing of the act immediately; but in point of interest, not till the avoidance. *Vide* 3 *Cro.* 323. 10 *Co.* 107. 4 *Mod.* 190. *Show.* 164. 3 *Lev.* 352. *S. C.*

3. LADD *v.* WIDDOWS.

[Mich. 1 Ann. B. R.]

UPON a motion by sergeant *Selby* for a new trial in a *quare impedit*, wherein the point in issue was, Whether the church was donative or presentative? evidence was pretended of several presentations; and the Court, *viz. Holt*, C. J. and *Powell*, J. held, That though a presentation might destroy an impropriation, yet it could not destroy a donative, because the creation thereof was by letters patent, whereby land is settled to the parson and his successors, and he to come in by donation.

Presentation may destroy impropriation, but not a donative. Holt 259. S. C. Degg. 205. contra. Vide 2 Cro. 63. Co. Lit. 344. n. 2 Rol. 342. l. 50.

PRINCIPAL AND ACCESSARY. [542]

Vide 1 Lev. 204. Hale's P. C. 215 to 225. Hawk. P. C. 310, 311, &c.

1. DOMINA REGINA *v.* NASH.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 989. S. C. not S. P.]

UPON a conviction of deer-stealing by justices of peace, on the late statute, the question was, Whether one not present, but procuring, advising, and abetting, by lending his gun, dog, *&c.* before the fact, should be said *to be aiding and abetting therein? Holt*, C. J. inclined, 1st, That he was not within the words, not being actually present at the fact, because the statute is to be construed strictly, for that it takes away the privilege of a better trial, *viz. per pares*. 2dly, Because it adds a farther penalty to what was an offence before. He said there

Who is an aider and assister in deer-stealing within 3 & 4 W. & M. c. 10. N. B. Faresl. 129 to 137. Vide Cro. Car. 340.

might be an aiding and abetting before the fact, *viz.* by advice, *&c.*, or in the fact, by being present; or after the fact, by abetting the party. *Vide Dy.* 187. *Co. Ent.* 56. The other judges held aiders in the fact would be principals, and then aiders and abettors would mean nothing. *Quod Holt negavit*, saying, All that are present may be said to be principals as to an action of trespass, but not as to the penalty of the statute: And this diversity is apparent in other cases, for one aiding and assisting upon the statute of stabbing shall have his clergy, whereas a principal shall not; so in the case where two went to break a house, one broke it and entered, the other stood upon the ladder, and received the goods; he that stood upon the ladder shall have his clergy, and the other shall not, being a principal (*a*).

Vide Kely. 52, 53. 1 And. 1. 6.

(*a*) *Quære*, if the last point is not placed here by mistake; for at the end of the report of the next case, *Q.* and *Whistler*, in Ld. *Raymond*, there is a reference made by *Holt*, Ch. J., to a case in *Cro. Car.* 473. having the circumstances above supposed in an indictment on the stat. 39 *El. c.* 15., against shoplifting.

2. DOMINA REGINA *v.* WHISTLER.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 842. S. C.]

Where statute makes an offence felony, accessaries (properly) are within it, tho' not named; otherwise where it makes a particular fact more penal. Far. 129. S.C. Rep. A. Q. 25. Holt 215.

ROLFE and others were convicted of deer-stealing upon 3 *&* 4 *W. & M.* c. 10., and that *Whistler* was *illicite & injusta auxilians & assistens præfat. Rolfe, &c. in illicita & injusta venatione & occisione damæ præd., viz. persuadendo & incitando præfat. Rolfe* to kill the same deer, and lending dogs to hunt and kill, and horses to carry away the said deer, *contra formam statuti;* and whether this was an aiding and assisting within the statute, was the question. *Powell*, *Powys*, and *Gould*, Justices, held that it was; but *Holt*, C. J. *contra*, held, that the conviction ought to be quashed; for that where a statute makes that felony, which was not so at common law, aiders and abettors, according to the notion of the common law, are within the statute, though not expressed; but where an offence at common law is only made more penal, aiders and abettors are not to be understood of such as aid before and after the fact, but such as are present only: These were only accessaries at common law, and are not within the act. *Vide* 1 *Cro.* 474. *Dal.* 11, 22. *Postea*, in the same case, *Holt*, C. J. said, he held the same diversity, with this farther, that this is to be understood when an offence at common law is made more penal by a particular description of the fact, and not under a general denomination of the crime; as if this statute had enacted these penalties on them as tres-

[543]

3 Cro. 750. 12 Co. 86.

Vide 1 Salk. 181, 182.

passers, as it is done by the statute, *de malefactoribus in parcis*. *Vide* 1 *And.* 116. *Hale* 51, 216.

PRIVILEGE OF PERSONS.

Vide 3 Lev. 243, 393. Lutw. 196, 197, 641, and 1466. 1 Sid. 319. 2 Sid. 164. 1 Vent. 137. Cro. El. 138.

1. KIRKHAM *v.* WHEELY.

[Trin. 7 Will. 3. B. R. 1 Ld. Raym. 27. S. C.]

Pleas to the jurisdiction in the negative is well enough. Ante 30. S. C. Comb. 319. 3 Salk. 282. Cas. B. R. 74. Defence by venit & dicit, or dicit only, is well in plea to the jurisdiction. Vide prox. casum.

TO an action *qui tam*, the defendant pleaded that he was an attorney of the court of Common Pleas, and that attornies *de C. B.* were not suable elsewhere. To this the plaintiff demurred, 1st, Because the plea is only in the negative, and no jurisdiction is given to any other court. 2dly, Because there is no defence by *venit*, but *dicit* only. *Per Cur.* As to the plea being in the negative, it is well enough; for the privilege is not traversable and triable *per pais*, but a matter of law of which we take notice; and *venit & dicit*, or *dicit* only, is a sufficient defence in this case. 14. *H.* 6. 14, 19.

2. STEPHENS *v.* ARTHUR.

[544]

[Eodem Termino.]

Vide prox. casum ante.

Defence. 1 Lev. 182. 1 Lutw. 7, &c. 2 Lutw. 1590. Andrews 46.

THE defendant pleaded to the jurisdiction thus, *viz. Et idem Arthurus in propria persona sua dicit*, that he is a clerk to a prothonotary of the Common Pleas; and it was objected, that he did not say *venit & dicit*. *Et per Cur. Venit* is no part of the plea, but *dicit* begins the plea; *dicit* alone shews him to be in court, and here it appears he is *in custodia*.

3. LANE *v.* SALTMARSH.

[Hill. 8 Will. 3. B. R.]

1 Wilson 306. S. P. Andrews 45. Str. 864. Ld Raym. 1567. 2 Bl. Rep. 1085.

AN attorney *de C. B.* being sued by bill in *B. R.*, *Buxton* moved he might be discharged. Denied *per Cur.*; for let him plead his privilege.

4. BROWN'S *CASE*.

[Hill. 9 Will. 3. B. R.]

Philizers, &c. 3 Lev. 343. 2 Lev. 129. 1 Lutw. 44, 641, 1466. 1 Wils. 306.

A PHILIZER *de B. R.* was arrested *per breve*, but discharged on common bail; for he ought to be sued by bill, as *præsens in Curia. Per Cur.*, *absente Holt*, C. J. (*a*).

(*a*) The officers of the Common Pleas have not the privilege of being sued there *by bill*, as attornies have; but have the privilege of being sued *there* by original writ, *Baker* v. *Swindon*, Ld. *Raym.* 399. 3 *Salk.* 283. 1 *Barnes* 280. 2 *Crop. Pr.* 135.

5. BRANTHWAIT *v.* BLACKERBY & AL.

[Hill. 9 Will. 3. B. R.]

For a joint cause of action against an attorney with another man, both must be arrested. Vide 1 Saund. 68, 69. Cases B. R. 163. S. C. 1 Vent. 298.

IF a man hath a joint cause of action against two, one an attorney, and the other not, he must arrest both, and declare against them as in custody. A bill cannot be filed against a person privileged in vacation (*b*), for then he is not present in court; and as to the vacation, it begins the last day of the term, as soon as the court rises. (*Vide* 2 *Lev.* 129. 1 *Vent.* 298.)

Note; The bill must be filed, though the attorney agrees to appear and dispense with it; but it may in such case be filed afterwards. *Pasch.* 9 *Will.* 3. *B. R. Robert's* case.

(*b*) In *Wagborne* v. *Fields*, 5 *T. R.* 174. it was decided that a bill may in all cases be filed against an attorney in the vacation. *Vide Comerford* v. *Price*, *Doug.* 312. *Lane* v. *Wheate*, *ibid.* 313, *n.* 84.

6. ANONYMOUS.

[Hill. 2 Ann. B. R.]

Privilege eundo & redeundo. Vide Raym. 100. 3 Lev. 343. Andrews 275.

H. CAME to confess an indictment, and the Court held, that he had no privilege, *eundo & redeundo*, because there was no process against him (*c*).

(*c*) In *Meekins* v. *Smith*, *H. Bl.* 636. the Court of Common Pleas laid down this general rule; *viz.* that all persons who have relation to a suit which calls for their attendance, whether they are compelled to attend by process or not, (in which number bail are included,) are entitled to privilege from arrest *eundo et redeundo*, provided they come

7. DILLON v. HARPER.

[Trin. 2 Ann. B. R. 2 Ld Raym. 898. S. C.]

S. C. 1 Salk. 328. Faresl. 106.

AN attorney *de C. B.* being sued in *B. R.*, pleaded his privilege; to which it was demurred specially, for not concluding his plea with a *profert* of a writ of privilege, testifying his being an attorney, *&c.* *Et per Holt*, C. J. The difference is, if privilege of an attorney be pleaded with a writ, the defendant cannot be denied to be an attorney; if without, he may, and then a *certiorari* shall be awarded to certify whether he be an attorney, or not.

Where privilege of an attorney is pleaded with a writ, his being an attorney cannot be denied; otherwise if without.

Skin. 582.

8. SCAWEN v. GARRET.

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1172. S. C.]

TO an action in *B. R.* the defendant pleaded, that he was an attorney at the Common Pleas. On demurrer Mr. *Ward* objected, that he ought to produce his writ, and conclude with a *prout patet per recordum;* and also that he laid no *venue*, alleging no place where he was attorney, nor where the Court of Common Pleas sits. *Et per Cur.*, *viz. Holt*, C. J., to which the rest assented, An attorney may plead privilege with a *profert* of his writ, if he will; or with an exemplification of the record of his admission; or he may plead it as he does here, and it is well enough, for so are the precedents, and the plaintiff may reply *nul tiel record. Vide* 1 *Brown.* 2 *Thom.* 4 *Cliff.* 570. *Brevia judicialia* 169, 172., cited *per Broderick.* Thirdly, there was no need of a *venue* to try where he was attorney, for it being a matter concerning his person, was triable where the writ is brought: So in trespass, if the defendant pleads *son villain regardant*, and the plaintiff replies *frank-home*, it must be tried where the writ is brought. As to the 3d, he wondered how that ever came to be allowed; for that this Court sends writs to the Chief Justice of the Common Pleas by that name: And unless where this is held to be part of the description of a record, it can never be necessary (*a*).

Plea of privilege of an attorney of C. B. need not shew the writ under seal, nor a venue, nor where the C. B. sits. Vide 1 Saund. 67. Faresl. 97. 6 Mod. 114. 5 Mod. 310. 1 Salk. 6. Holt 587. S. C. Lilly Ent. 7.

Privilege of Jurors, Raym. 113, 144. 1 Lev. 159.

Privilege of the King's Servants, *&c.* Raym. 152, 180. 1 Lev. 233, 265.

(*a*) An attorney has privilege of suing a member of the university in the Court to which the attorney belongs, *Joliffe* v. *Langston*, 1 Ld. *Raym.* 342. Where an attorney of one Court sues an attorney of another by attach-

ment, the Court first possessed of the cause shall be preferred, *Danser* v. *Berryman*, 2 *Bl.* 1325.; but suing by original is a waiver of privilege, *Hetherington* v. *Lowth*, 2 *Str.* 857. Where both plaintiff and defendant are attornies of the same Court, the suit must be by bill, and not attachment, *Ratcliffe* v. *Besley*, 2 *Str.* 1141. If both parties are attornies of *B. R.* privilege will be allowed, *secus* if the plaintiff belongs to *C. B.* and defendant to *B. R.*, *Shorter* v. *Packhurst*, 1 *Bl.* 19. An attorney has no privilege against the Court of Conscience in *London*, *Silk* v. *Rennett*, 3 *Burr.* 1583. *secus* as to the County Court of *Middlesex*, *Wiltshire* v. *Lloyd*, *Doug.* 380. An attorney of *B. R.* being sued as an attorney of *C. B.*, and lying by was held to waive his privilege, *Hern* v. *Howard*, 1 *Bl.* 231. A *ca. sa.* for costs, returnable on a general return, held good against an attorney who had sued by attachment of privilege, and was nonsuited. *Perrott* v. *Hele*, 3 *Wils.* 58. Plea of privilege as an attorney ought to conclude to the record, *Foster* v. *Cole*, 1 *Str.* 114.

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[546]

PRIVILEGE OF PLACE.

Privilege of the Exchequer. 6 Mod. 305. Ante 511. Post 550. pl. 12. 1 Lutw. 46. 2 Wilson 228. Andrews 45.

PER Walter, Chief Baron. The causes of privilege in the Exchequer are, 1st, If one be informer for the king. 2dly, If one be accountant to the king. 3dly, If one be debtor to the king. 4thly, Where one is an officer of the court, or attends an officer of the court. Alwayc where the plaintiff is privileged, the suit is by *quo minus;* where the defendant is privileged, the suit is by bill. 31 *H.* 6. 10., 22 *H.* 6. 19. *b.*

Supersedeas to a suit in the Exchequer, dummodo non tangit nos.

A writ was delivered to the barons of the Exchequer in open court, commanding them to stay a suit between *Wilson* and *Rookes*, by *dummodo non tangit nos vel*, &c., and the writ was disallowed, for that the defendant might have pleaded that matter to the jurisdiction of the Court. It was admitted, that there is such a writ in the Register, but there are several writs there which no usage or precedent does warrant, of which this is one. *Et per Walter*, Chief Baron, Where one entitled to the privilege of this court is sued in C. B., this Court sends a *supersedeas;* but if it be in *B. R.* they do not send a *supersedeas*, for that would be to supersede the king; but the practice is, to send up the writ-book by the *puisne* baron, and demanded privilege. *Trin.* 3 *Car. In Scac.*

Privilege of the King's Palace, &c. *Vide* 6 Mod. 73 *to* 76. 1 Mod. 76. 1 Sid. 211. 1 Lev. 106. 1 Vent. 169. 2 Mod. 181. 3 Inst. 141. Pryn's 4 Inst. 18, 19. Philipp's Regale Necessarium, *chap.* 1 & 3. 1 Hawk. *cap.* 21.

PROHIBITION AND CONSULTATION.

Hob. 300, 301. 3 Bulst. 51. S. C. 1 Show. 158, 172. Vide Raym. 123, 189, 191, 219. Cro. El. 88, 666. Carth. 142. 3 Mod. 283. Comb. 160. Holt 612.

1. SHOTTER v. FRIEND.

[Hill. 1 W. & M. B. R. Rot. 39.]

Prohibition to a suit for a legacy, for refusing proof of payment by one witness. Latch. 117. Moor Cas. 568. Otherwise in probate of wills. 1 Lev. 164, 180. 2 Lev. 64. Temporal incident must be tried according to rule of the common law. Vide post pl. 11. 3 Mod. 283. S. C. 6 Mod. 239. Vide Cowp. 424. 2 Rol. 305, 655. 1 Vent. 291.

AN executor being sued for a legacy in the Spiritual Court, pleaded payment, and offered to prove it by one witness, which the judge refused, and gave sentence against him. Upon this matter suggested, a prohibition was moved for. *Et per Cur.* 1st, Where the Ecclesiastical Court proceed in a matter merely spiritual, if they proceed in their own manner, though that is different from the common law, no prohibition lies; as in probate of wills; there, if they refuse one witness, no prohibition lies. *Noy* 12. 2 *Ro.* 300. 2dly, Where they have conusance of the original matter, and an incident happens which is of temporal conusance, or triable by the common law, they shall try the incident, but must try it as the common law would: Thus in a suit for tithes or for a legacy, if the defendant pleads a release or payment, or in a suit to prove a will, if the defendant pleads a revocation. 1 *Ro. Rep.* 12. 2 *Ro. Rep.* 42. *Yelv.* 92. So in the case at bar, they shall try the matter of payment or no payment, but then they must admit such proof as the common law would, or otherwise they reject the cause themselves, and ought to be prohibited. 3dly, A bare suggestion, that the defendant has but one witness, and that they take exceptions to his credit and reputation, is no cause of prohibition; for if they admit the proof of one witness, whether he be a credible witness, or not, they shall judge, and the party has no remedy but by appeal. 4thly, That is not too late to come for a prohibition after sentence; for the sentence in this case is the grievance. Consultation denied.

Vide Doug. 376 (363.) 2 T. R 473.

2. *Inter* STARKY *and* THE CHURCHWARDENS OF WATLINGTON IN SUSSEX.

[Trin. 4 W. & M. B. R.]

Prohibition to stay a suit in the Spiritual Court for taking bells. See 6 Mod. 11, 12, 25, and 79, 424, 131. 1 Salk. 34, 35. 4 T. R. 351. 2 Inst. 492. Rol. 57.

SUIT in the Spiritual Court for taking away two bells out of the steeple, and a prohibition was granted; for the churchwarden is a corporation, and the property is in him, and he may bring trover at common law.

3. WHARTON v. PITS.

[Trin. 4 & 5 W. & M.]

Prohibition to the Admiralty denied, unless the defendant would appear and give bail. 1 Vent. 146, 343. Ray. 3. 3 Mod. 244. Post. 553.

A SUIT was in the Admiralty against the master and ship which lay in the *Thames*, for heedlessly running over another ship, and the defendant there moved for a prohibition. The plaintiff informed the Court, that the defendant would not appear, so that he could have no remedy at law; upon which the Court refused a prohibition, unless the defendant would appear and give bail (*a*).

(*a*) ***R. cont.*** 3 ***T. R.*** 316. Lord ***Kenyon*** there said, that as the reasons of the judgment in this case, as here reported, were not disclosed, and as the case itself was not mentioned in any other book, the Court were of opinion that it was not a sufficient authority to warrant them in imposing the terms prayed for. ***N. B.*** Those terms were the same as the above.

4. HARRIS v. HICKS.

[Hill. 4 & 5 W. & M. B. R.]

Prohibition quoad annulling marriage and bastardizing issue. 1 Salk. 120 to 123. 3 Lev. 410. Lutw. 1059, 1075. 4 Mod. 182. Carth. 271. called Hinks vers. Harris. S. C. 4 Mod. 182. Comb. 200. Cases B. R. 35. Stiles 10. 2 Jon. 213. 2 Vez. 245.

PROHIBITION was moved for to the Ecclesiastical Court of *Coventry* where a suit was against the plaintiff for incest, in marrying his first wife's sister, suggesting that the said second wife was dead, and by his said wife he had a son, to whom an estate was descended as heir to his mother, and that notwithstanding that he had pleaded this matter, they went on to annul the marriage and bastardize the issue. *Et per Cur.* A prohibition shall go as to annulling the marriage or bastardizing the issue, but they may proceed to punish the incest.

Lutw. 1037, 1043, 1053.

5. HAWKIN'S *CASE*.

[Hill. 8 Will. 3. B. R.]

Prohibition to a suit for calling H. knave. Vide Far. 31. Post. 692, 693. 2 Lev. 49, 63, 66. 3 Lev. 17, 119, 137, 350. Godb. 447. 2 Rol. 297.

H. LIBELLED in the Spiritual Court for calling him *a knave, a knave, and a knave indeed;* and a prohibition was granted, because nothing was said that could make him liable to ecclesiastical censure. The statute *de circumspecte agatis* mentions only such defamations as are punishable in the Spiritual Court; and for such as the Spiritual Court cannot punish, the party shall not be liable there: The reason why the laying violent hands upon a clergyman was there suable, was, because the clerk having

habitum & tonsuram, which made him known, it was an affront to the whole order.

6. GARDNER *v.* BOOTH.

[Trin. 10 Will. 3. B. R.]

WHERE it doth appear in the libel, or by the proceedings in the cause, that the conusance of the cause does not belong to the Spiritual Court, a prohibition may be moved for and granted after sentence; and this holds in all cases but where one is sued out of his diocese; for there, if he doth not take advantage of it before sentence, he shall not have *a prohibition after sentence; *ratio est*, because the cause doth belong to the Spiritual Court; and though it doth not belong to that Spiritual Court, it belongs to some other, and not to the king's Temporal Court.

Prohibition may be granted after sentence where cause is not of spiritual conusance; otherwise for citing out of the diocese. Vide Faresl. 137, 148. S. C. Cases B. R. 196. Andrews 11. 2 Inst. 602. 2 Bur. 813. Cowp. 424. For prohibitions after sentence, vide Faresl. 137, 148. Winch. 8. 1 Show. 158, 172. 6 Mod. 252. 1 Sid. 65, 632. N. B. 2 Lev. 230. Doug. 377.

7. Bishop of St. David's *Case*. Pasch. 11 Will. 3. B. R. *Vide* this Case, title *Bishops, Archbishops*, &c. Part 1. page 134.

8. GODFREY *v.* LLEWELLIN.

[Trin. 11 Will. 3. B. R.]

WHERE the matter suggested for a prohibition appears upon the face of the libel, we never insist upon an affidavit; but unless it appear upon the face of the libel, or if you move for a prohibition as to more than appears on the face of the libel to be out of their jurisdiction, you ought to have affidavit of the truth of your suggestion. *Per Holt*, C. J. *and postea Trin.* 12 *Will.* 3. B. R. *Vide* 2 *Co.* 45.

Where matter of the suggestion does not appear on libel, affidavit is necessary. Hob. 79. Andrews 7. 299. Ante 461. 1 Lev. 253. S. C. Holt 593. Vide 4 Bur. 2040. Carth. 463

9. MACHIN *v.* MAULTIN.

[Mich. 11 Will. 3. B. R. 1 Ld. Raym. 452, 534. S. C.]

IN a declaration in attachment *sur prohibition*, the case was, that the plaintiff lived in *Nottingham* within the province of *York*, and there subtracted tithes, and then re-

H. subtracts tithes in one diocese, and removes into an-

other, afterwards being found in the first, is there cited and sued, and a consultation awarded. Subtraction of tithes local. Raym. 95. Lutw. 1043, 1057, 1062, 1071. S.C. 5 Mod. 450. N. Lutw. 335. Carth. 276. 3 Salk. 90. Cases B. R. 252. Vide Fitzg. 110.

moved into *Lincolnshire* within the province of *Canterbury*: Afterwards he happened to go to *York*, and was sued there in the Court of the Archbishop, for the subtraction aforesaid, and had a prohibition on 32 *H*. 8. *c*. 9. for citing him out of his diocese. But at last, after debate, a consultation was awarded; for that the subtraction of tithes is local, and must be sued before the ordinary of that place where the wrong was done; otherwise in cases transitory, *ubi forum sequitur reum*. And it was argued by the counsel, this is not citing out of his diocese within the statute, because the diocese where he lives has not a jurisdiction; and if he might not be cited in this case, the thing would be remediless and dispunishable. *Vide Godb*. 191. 1 *Ro. Rep*. 328. 1 *Cro*. 97. 13 *Co*. 4. *Winch. Entre*. 570. 2 *Ro. Rep*. 448. 3 *Mod*. 211. 2 *Brown*. 12, 28.

[550]

10. JONES *v*. STONE.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 578. S. C.]

Suit in the Ecclesiastical Court against the vicar of S. for not performing divine service in the chapel of C., as bound by custom, prohibition denied. S. C. Holt 596. Post. pl. 13.

DAVID JONES, the vicar of N., was libelled against in the Spiritual Court, for that by custom time out of mind the vicars of *S*. had by themselves, or others, said and performed divine service in the chapel of *Chawbury*, for which there was such a recompense; and that he neglected. The defendant came for a prohibition, and without traversing this custom, suggested that all customs were triable at common law: And Mr. *Harcourt* urged, that it was enough for a prohibition, that a custom appeared to charge the vicar with a duty for which he was not liable of common right. *Et per Holt*, C. J. A parson may be bound to an ecclesiastical duty by custom, and when he is bound by custom, the Spiritual Court may punish him if he neglects that duty; the custom might have a reasonable commencement by composition in the Spiritual Court, and begin by an ecclesiastical act: And a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclesiastical right, an ecclesiastical person, and an ecclesiastical duty, and the prescription not denied (*a*); notwithstanding 2 *Inst*. 491. I never could get a prohibition to stay a suit in the Spiritual Court against a parson for a pension by prescription. *Vide* 1 *Vent*. 3, 120, 265.

Paresl. 88. 6 Mod. 330. F. N. B. 51. b.

(*a*) *R. acc. Dutens* v. *Robson, H. Bl.* 100.

11. SIR BASIL FIREBRASS'S *CASE*.

H. WAS chief ranger of *Enfield Chase*, and now a bill was exhibited against him in the Chancery of the dutchy for a discovery of what deer he had killed, and what timber, wood, *&c.* he had felled and cut down, and by what warrant, and to shew cause why his patent should not be repealed. And to this suit a prohibition was granted *nisi;* for he shall not be obliged to answer upon his oath, what is to make him forfeit his place, but it ought to be proved against him (*a*).

Prohibition granted to a suit in equity for discovery of matters to make the defendant forfeit his freehold. 4 Leon. Cas. 261. Vide ante pl. 1. Raym. 88, 221.

(*a*) A defendant may be protected from making a discovery which may subject him to any penalty or forfeiture, or any thing in the nature of a forfeiture, by demurrer, if the matter is apparent on the bill; or by plea, if it arises from extrinsic circumstances: As when, on an insurance of goods to a foreign port, the bill prays discovery whether the goods did not consist of wool, which it is penal to export to such port, *Dimcalf* v. *Blake*, 1 *Atk.* 52. So, whether goods were taken from the *Indians* by fraud, violence, or contrivance, *E. I. Comp.* v. *Campbell*, 1 *Vez.* 246.; or whether a bond was usurious, Earl of *Suffolk* v. *Green*, 1 *Atk.* 450.; or whether the defendant at the time of her intermarriage with *A.*, was married to another person, 3 *Bro. P. C.* 65. So where a purchase of land is charged to be made from a person out of possession, which is contrary to stat. 32 *Hen.* 8. *Sharp* v. *Carter*, 3 *Wms.* 374. Whether the defendant procured subornation of perjury, *Baker* v. *Pritchard*, 2 *Atk.* 387. Whether a purchase was made from a Papist, *Smith* v. *Read*, 1 *Atk.* 526. *Harrison* v. *Southcote*, 1 *Atk.* 528. 2 *Vez.* 389. Whether the party is an alien, on an information by the attorney-general, for lands in his possession, *Attorney-general* v. *Duplessis*, cited 2 *Vez.* 494. *Vide Parker* 144. Whether a person holds an office in trust for the defendant, which would vacate the defendant's seat in parliament, *Honeywood* v. *Selwin*, 3 *Atk.* 276. Whether the defendant was married to *A.*, and *B.* was her legitimate son by him, when she pleads that she had been previously married to *C.*, *A.*'s brother, in which case her marriage with *A.* would subject her to ecclesiastical punishment, *Brownsword* v. *Edwards*, 2 *Vez.* 243. Whether the defendant, after being instituted to *A.*, has been instituted to two other livings, which would cause an avoidance of *A.* *Boteler* v. *Allington*, 3 *Atk.* 453. Whether the defendant had married, so to incur the forfeiture of an estate or legacy, *Monins* v. *Monins*, 2 *Ch. Rep.* 86. *Wrottesley* v. *Bendish* 3 *P. Wms.* 235. *Chauncey* v. *Tahourden*, 2 *Atk.* 392. *Chauncey* v. *Fenhoulet*, 2 *Vez.* 265. Or whether a tenant has assigned a lease, wherein there is a proviso that it shall be void on assignment, *Fane* v. *Altee*, 1 *Eq. Ca. Ab.* 77.

A defendant was compelled to answer a bill to discover a conspiracy or attempt to set up a child she pretended to have by a person who kept and was desirous to have a child by her, *Cheboynd* v. *Lindon*, 2 *Vez.* 450. To discover whether he was tenant for life, though he pleaded that he had made a lease for the life of another, which would be a forfeiture, *Weaver* v. Earl of *Meath*, 2 *Vez.* 108. To discover whether he has a legitimate son, as it does not tend to discover whether he cohabited with any woman, *Finch* v. *Finch*, 2 *Vez.* 491. To discover a second marriage, upon which an estate was limit[illegible] from the defendant, such limi[illegible] being considered as a forf[illegible] *as* v. *Evans*, 3 *Atk.* 260.

Defendants are boun[illegible]nts not to plead or dem[illegible]sco-

very, on account of its subjecting them to penalties or forfeitures, *E. I. Comp.* v. *Atkyns*, *Com.* 346. 1 *Str.* 168. *Mos.* 74. *South Sea Comp.* v. *Bumsted*, 1 *Eq. Ca. Ab.* 78.

If the forfeiture is waived by all who are interested therein, the discovery must be made, *Mitford* 158. *Vide Mit.* 157, 224. 1 *Vern.* 109, 129, 306. *Parker* 144. 1 *Harr. Ch. Pr.* 7th edit. 378. *Bunb.* 192. *Hard.* 138. *Com. Ch.* 3. B. 2.

12. EARLE v. PAINE.

[Mich. 12 Will. 3. B. R.]

Trespass in B.R. for taking wines staid by order of Exchequer, an information of seizure depending there. Exchequer privilege. Vide ante 546.

PAINE, a custom-house officer, exhibited an information of seizure of a hogshead of wine belonging to Mr. *Earle*, and seized for not paying custom. *Earle* neglected to come and enter his claim in the Exchequer, but in the mean time brought trespass in *B. R.* against *Paine*. Upon motion the barons ordered the proceedings

[551]

in the King's Bench should be stayed, and the cause there removed into the Exchequer in the same state and forwardness: *Earle* was served with the order, but notwithstanding gave rules for pleading; whereupon an attachment was issued by the Exchequer against him; whereupon he moved here for a prohibition to the Court of Exchequer. And a rule was made to hear counsel; on the *argument* several precedents were cited, one in 19 *H.* 7. *Rot.* 16. exactly like this. The Court took time to consider of the precedents, and in the mean time the matter was compounded. *Vide Reg.* 187. 2 *Inst.* 551.

Vide Hard. 193. Bunb. 34, 306, 309. Parker 143.

13. ANONYMOUS.

[Hill. 12 Will. 3. B. R.]

Prohibition shall not go for a modus or other foreign matter, unless it be pleaded below. Post. 656, 657.

IN the bishop of *Winchester's* case, 2 *Co.* 45. it is held, that in a suit for tithes in the Spiritual Court, *H.* may have a prohibition, suggesting a prescription or *modus*, before or without pleading. But this seems not to be law, for 12 *W.* 3. *B. R.* a prohibition was moved for, suggesting a custom, *&c.* *Et per Holt*, C. J. and the Court, it was denied, unless they pleaded it below, because perhaps they might admit the plea. Also 10 *W.* 3. *B. R.* it was said by *Holt*, C. J. That if a *modus* be pleaded in the Spiritual Court and admitted, no prohibition shall go; but if the question be, whether a *modus* or no *modus*, a prohibition shall go, and so is the law, *viz.* wherever the matter which you suggest for a prohibition is foreign to the libel, you must plead it below, before you can have a prohibition; otherwise where the cause of prohibition appears on the face of the libel.

Vi. 4 Bur. 2040. Rep. B. R. Temp. Hard. 257. Bunb. 17. Str. 878.

14. JACOB v. DALLOW.

S. C. Faresl. 8. 6 Mod. 230. 5 Mod. 436. Cases B. R. 233.

[Pasch. 1 Ann. B. R. 2 Ld. Raym. 755. S. C.]

H. having a prescriptive right to a seat in a church, & being disturbed, may sue in the Spiritual Court to have his possession quieted. Vide Lutw. 1032. 5 Mod. 69, 70, 71. 1 Keb. 457

THE plaintiff declared in a prohibition, setting forth a prescriptive right in the plaintiff and those whose estate he had, *&c.* to a seat in the church, and that the defendant surmising a usage time out of mind, had libelled against him in the Spiritual Court, for disturbing him in sitting there, and shews that he had denied the usage in the Spiritual Court, and the judge had refused to allow his plea. The defendant traversed the plaintiff's prescription, and pleaded his own usage; upon which there was a demurrer. Mr. *Eyre* urged, that though the plaintiff had by his demurrer confessed his prescription to be false, and by consequence that he had no right to the seat; yet the defendant grounding his libel below upon a custom which is not triable there, he could not have a consultation. *Vide Hetl.* 94. *Noy* 78. 2 *Jo.* 3. *Holt*, C. J. held, That if the plaintiff had not a title by prescription, he ought not to disturb the possession of the defendant; and the ordinary hath conusance of such disturbance, and may settle it according to usage and possession, unless there be a temporal prescriptive title hurt by their sentence; and the defendant might well sue in the Ecclesiastical Court to have his possession quieted, and might admit his prescription to be tried there, as a defendant does a *modus* or a pension by prescription.

Vide 1 Bur. 314.

[552]

15. GALIZARD v. RIGAULT.

S. C. Faresl. 78, 79, &c. Holt 597, 50.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 809. S. C.]

Prohibition to a suit against H. for solicitation of chastity; H. having been convicted on indictment for assault with intent to ravish. 2 Lev. 63.

INDICTMENT was for assaulting, beating, wounding, and endeavoring to ravish the wife of *B.*, upon which the party was convicted, and afterwards the husband brought an action of trespass for the same cause; and now the party being also libelled against in the Spiritual Court for the same fact, *viz.* for soliciting her chastity, moved for a prohibition to the proceedings in the Spiritual Court; and it was urged for the jurisdiction of the Spiritual Court, that they may punish for the solicitation and incontinence, and that this suit was *pro salute animæ*, the other for fine and damages. *Sed per Cur.*, A prohibition was granted; for it being an attempt and solicitation to incontinence, coupled with force and violence, it does by reason of the force, which is temporal, become a temporal crime *in toto;* as if one say, *Thou art a whore*

Palm. 379. Post. 692, 693. 1 Cro. 286. 1 Mod. 31. 2 Keb. 589. 1 Vent. 53. Cro. Car. 393. 1 Sid. 438.

and a thief or *Thou keepest a bawdy-house*, which are temporal matters, the party shall not proceed in the Spiritual Court; whereas, if it were only, *Thou art a whore*, a libel lies in the Spiritual Court. So if it be said of a woman that she is a bawd only, and not that she keeps a bawdy-house (*a*). But *per Holt*, C. J. If one commit adultery, and the husband bring assault and battery, this shall not hinder the Spiritual Court, for it is a criminal proceeding there, and no indictment lies at common law for adultery (*b*). 1 *Roll. Abr.* 295. 2 *Inst.* 488.

(*a*) *R. acc. Str.* 1100.

(*b*) It appears by the report in Ld. *Raymond*, that the Chancellor consented to allow a further argument by civilians; but that the prohibition stood, upon discovering a defect in the pleadings.

16. PARTRIDGE'S *CASE*.

[Mich. 1 Ann. B. R.]

Prohibition to probate of will of lands and goods, upon suggestion of non compos, denied. Mod. Cases 239. Cro. Car. 396. 2 Rol. 315. Hard. 131.

A PROHIBITION was prayed to the Spiritual Court to stay the probate of a will, which contained a devise of lands and several legacies, suggesting this matter, and that the testator *was non compos;* and the Marquis of *Winchester's* case, 6 *Co.* 23. was relied upon: But the Court denied that case, and said, that the statute of *H.* 8. never intended to lessen the jurisdiction of the Ecclesiastical Court as to the probate of wills. And to grant a prohibition might be inconvenient, for without probate the executor [553] cannot sue for debts, which by this means may be lost, and the will unperformed. As for granting it *quoad* the land, it would be vain, (*Vide* 2 *Ro.* 315. 1 *Sid.* 141. this was the practice heretofore,) because it is no evidence either *pro* or *con* in any court of law, but a proceeding *coram non judice:* yet it is good as to the goods (*a*).

(*a*) In *Montgomery* v. *Clark*, 2 *Atk.* 379. Lord Chancellor *Hardwicke* said he had often thought it a very great absurdity that a will, which consists both of real and personal estate, notwithstanding it has been set aside at law for the insanity of the testator, shall still be litigated upon paper depositions only in the Ecclesiastical Court, because they have a jurisdiction on account of the personal estate disposed of by it. He wished gentlemen of abilities would take this inconvenience and absurdity into their consideration, and find out a proper remedy by the assistance of the legislature. But as the law stands at present, it is not in the power of the Court of Chancery to interpose, so as to stop the proceedings in the Ecclesiastical Court. The exclusive jurisdiction of the Ecclesiastical Court to decide upon fraud in obtaining wills, or the sanity of the testator, so far as relates to personal estate, appears in *Archer* v. *Moss*, 2 *Vern.* 8. *Nelson* v. *Oldfield*, 2 *Vern.* 76. *Kerrick* v. *Bransby*, 3 *Bro. P. C.* 358. *Bennett* v. *Vade*, 2 *Atk.* 324.

Vide Meadows v. Duchess of *Kingston*, *Amb.* 756. But if a probate is obtained by fraud, a Court of Equity will decree the executors to be trustees for the next of kin, or to consent to a repeal of the probate by the Spiritual Court. *Vide Tucker* v. *Phipps*, cited in *Barnesley* v. *Powell*, 1 *Vez.* 120.

The probate, if unrepealed, is conclusive evidence of the goodness of the will upon an indictment for forgery, *Rex* v. *Vincent*, *Str.* 481. *Rex* v. *Rhodes*, *Str.* 703. With respect to the conclusive effect of a direct sentence of a Court having competent jurisdiction, *vide Blackham's* Case, 1 *Salk.* 290., and the authorities there cited; and *Baker* v. *Pritchard*, 2 *Atk.* 387.

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17. Matthews *v.* Burdett. Hill. 1 Ann. B. R. *Vide* this Case, title *Universities and Schools.*

S. C. ante 412 Post. 672.

18. CHAMBERS *v.* SIR JOHN JENNINGS.

[Hill. 1 Ann. B. R.]

S. C. Faresl. 125.

A SUIT by libel was in the Court of Honour for these words, *viz. You a knight? You a pitiful inconsiderable fellow.* And a rule was made to shew cause why there should not be a prohibition: Against which it was urged, that there would be no remedy in this case, if this was not allowed. *Holt*, C. J. doubted whether there was or could be any such court; but said a prohibition would lie to a pretended court; and after no one precedent could be found of such a suit for words in the Court of Honour, the prohibition went absolutely.

Prohibition to the Court of Honour. Vide Lutw. 1053, 1054. Parliament Cases 58 to 67. 1 Show. 353. 2 Lev. 230. 4 Mod. 128. 1 Sid. 353. 1 Keb. 310, 316, &c. Hawk. 9, 10. Lutw. 1053.

.19. ANONYMOUS.

[Hill. 2 Ann. B. R.]

PROHIBITION lies for denying a copy of the libel to any Ecclesiastical Court: *Nam jura Ecclesiastica sunt limitata;* and the party ought to know whether the matter be within their jurisdiction, and how to answer. 1 *Ro. Rep.* 337. *Dighton's* case. *Et Mich.* 2 *Ann. B. R.* It was said by *Holt*, C. J. that it was formerly held by all the judges of *England*, that when there was a proceeding *ex officio* in the Ecclesiastical Court, they were not bound to give the party a copy of the articles; but the law is otherwise: For in such case, if they refuse to give a copy of the articles a prohibition shall go *quousque* it be given; and accordingly a prohibition was granted *per Cur. Nota tamen Pasch.* 11 *W.* 3. *B. R. Hall* moved for a

Prohibition lies to the Spiritual Court in any suit for denying a copy of the libel, but not to Admiralty.

See 6 Mod. 156, 308. Hob. 79, 213. 3 Bulst. 51. Ante 548. pl. 3. 1 Vent. 252. 1 Rol. Rep. 337. Hard. 364.

prohibition to the Admiralty for refusing a copy of the libel; and it was denied *per Holt*, C. J. *Quia n'est deins stat.*

[554]
Vide 6 Mod. 261. Post. 656.

20. FOY *v.* LISTER.

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1171. S. C.]

Suggestion in case of tithes must be proved within six kalendar months from teste of prohibition. Cro. Car. 208. Stat. 2 E. 6. c. 13. § 14. Carth. 461. S. C. Cases B. R. 206. Holt 672.

ON a *modus* suggested to pay every tenth day's milk, from *April* to *November*, skimmed and then made into cheese, in lieu of all tithe of milk, a prohibition was granted to try the *modus*, and settle the matter; and upon speaking to the goodness of the *modus*, these cases were cited. 3 *Cro.* 609. *Mod.* 909. *Latch.* 226. 1 *Ro.* 649. *N.* 17. 648, 649. At last Mr. *Eyre* came and shewed, that the prohibition was tested the 29th day *November*, and that six months, *i. e.* kalendar months (as they ought to be, *Noy* 30. *Hob.* 179. *Litt. Rep.* 19.) were expired the 25th day of *May* last, and therefore he moved for a consultation, because in all that time they had not proved their suggestion; and had it upon the statute 2 *Ed.* 6. And the Court agreed that the statute extends to suits for small as well as great tithes, and that the six months are to be computed from the teste of the writ; and the case in *Moore* 573. wherein it is said there must be six months in term-time, was denied. For proving suggestions, *vide Co. Ent.* 462, 463, 4. Consultations for not proving them, *vide Ashl.* 444. *Thes. Brev.* 80. *Note;* The entry in *Ashton* is ill in the award of the costs, for there ought to be a judgment. *Yelv.* 119. 1 *Brownl.* 98.

[555]
Vide tit. Evidence and Witnesses. 1 Salk. 278, 281, 286. Post. 691. Fareal. 129.

PROOF.

BREDON *v.* GILL.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 219. S. C. Entry, 3 Ld. Raym. 179.]

Commissioners of appeals cannot proceed upon the depositions taken

ON an appeal from the commissioners of excise to the commissioners of appeals, according to 12 *Car.* 2. *c.* 23. the question was, Whether the depositions of the

witnesses, and their examination written down by the clerk of the commissioners of excise, should be allowed to be read in evidence on this appeal? Or, Whether the witnesses should not be brought in again personally, and be examined *viva voce?* The commissioners of appeals thought the depositions sufficient, and proceeded thereupon; and a prohibition was moved for, but denied at first, because this had been the course ever since the statute, and it was a summary proceeding: That it would occasion trouble and delay to the revenue to bring in all the witnesses again; and it was but proper the commissioners of appeals should have just the same evidence the first commissioners had. So it is in an attaint, and the law does not make *viva voce* evidence necessary, unless before a jury. In other cases depositions may be evidence: If it were not so in this case, they would be to try the matter *de novo*, instead of trying an appeal. *Sed postea Pasch.* 9 *W.* 3. *B. R. mutata opinione*, the Court held, That the commissioners of appeal ought to examine the witnesses *de novo* on the appeal; that it was the intent of the act, and the commissioners had a power given for that purpose, to administer oaths: That this was just, because the first sentence might be by default, or the depositions might misrepresent, or not represent the whole case; and that on appeals upon orders of justices, examination is always *de novo*. And a prohibition was granted; but *Holt*, C. J. said, his private opinion was, that if the witnesses were dead, they might use their depositions. *Vide Faresl.* 129. *The transfer-books of the East-India Company allowed as evidence, &c.*

before commissioners of excise, but must examine the witnesses de novo, unless dead. See 5 Mod. 9, 277, 271. S. C. 1 Chan. Cas. 73, 175, 236. 2 Chan. Cas. 260. 1 Salk. 281, &c. 5 Mod. 211, 386. 6 Mod. 225. Comb. 414.

Vide Bur. S. C. 136. 3 T. R. 707.

PROPERTY.

[556]

Vide 7 Co. 17. b. Kelw. 39. 4 Leon. Cas. 261. 2 Leon. 36. 11 Co. 82.

SUTTON *v.* MOODY.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 250. S. C. Comyns 34. S. C.]

THE plaintiff brought trespass for breaking his close and hunting there, & *centum cuniculos suos adtunc & ibidem invent. occidit, cepit, & asportavit;* verdict was for the plaintiff, and entire damages: And it was objected in arrest of judgment, that *H.* cannot have a property in conies which

H. has the property of things feræ naturæ, killed in his own grounds. Vide 11 Co. 17. b. Et post. 637.

667. Cro. Car. 553. Comb. 458. S. C. 5 Mod. 375. S.C. 3 Salk. 290. Cas. B. R. 144, 145. Holt 608. Godb. 174. 12 Hen. 8. 9 22 Hen. 6. 59. b.

are *feræ naturæ*, unless on a special account; as if he has a warren of them, then he may say, *Quare warrenam suam fregit, & cuniculos suos cepit.* *Vide* 1 *Cro.* 553. *F. N. B.* 87. *Reg.* 93. *b.* 1 *Brownl.* 167. *Curia contra:* For a warren is but a franchise to keep them; and notwithstanding that, the owner has no more property in the conies themselves than any man that has them in his own land: if *H.* starts a hare in my close, and kills her there, it is my hare; otherwise if he hunts her into the ground of a third person, then it is the hunter's. Judgment *pro quer.*

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[557]

See 1 Salk. 330. Post. 597.

QUANTUM MERUIT.

Ante 439. Same name, but a different case.

1. SNOW *v.* FIREBRASS.

[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 611. S. C.]

Quantum meruit for meat, drink, &c. uncertain as to time, well. Cases B. R. 434. S. C. Holt 609.

THE plaintiff declared, that the defendant, in consideration that the plaintiff had found him sufficient meat, drink, washing, and lodging, *pro diversis mensibus ultimo præteritis*, promised to pay him as much as he should deserve, and averred that he deserved so much. Upon *non assumpsit* pleaded, and verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was short and uncertain as to the time or number of months. *Sed per Holt*, C. J. The incertainty as to the length of time, or number of months, can do no more harm than incertainty as to the things, which has been often adjudged not to vitiate. It is enough to aver how much he deserved. Judgment *pro quer.*

See 1 Show. 342. 2 Saund. 373. Raym. 8.

2. GLOVER *v.* ROGERS.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1155. S. C.]

Quantum omitted, but held well.

PLAINTIFF declared that the defendant, in consideration that the plaintiff's testator had transported for him such and such merchandizes, promised to pay the plaintiff's testator *tantas denar. summas pro transportatione merchandiz. prædict. rationabiliter habere meruisset*, and avers that he deserved so much. Upon *non assumpsit*, verdict was for the plaintiff, and judgment in *C. B.* And now a writ

of error was brought thereupon in *B. R.* and objected that the word *quantum* was wanting, and it is not said who had deserved, and he avers he deserved so much for transportation of merchandizes. But the Court affirmed the judgment: *Tantum* is enough, *viz.* The defendant promised him to pay him *so much he deserved*, and *meruisset* signifies as much as *ipse meruisset;* and there being but two persons in the record, it could be nobody but the transporter, and they must have been the same merchandize for which the promise was made, or otherwise the plaintiff could not have had a verdict; which has cured the want of *prædict.* Vide 1 Salk. 26. 2 Rol. 246.

3. MOVERLY *v.* LEY.

[558] Vide Faresl. 106.

[Hill. 4 Ann. B. R. 2 Ld. Raym. 1223. S. C.]

To be taken according to the intent of the parties.

ASSUMPSIT, and declares *quod cum* the defendant, in consideration that the plaintiff would provide him meat and drink, promised to pay him as much as the plaintiff *habere meruit*, and avers that he deserved so much. There were also other counts. *Non assumpsit* was pleaded, and verdict for the plaintiff, and entire damages. Upon motion in arrest of judgment it was objected, that *meruit* should have been *meruerit*. The Court held at first, that this was not false *Latin*, but false sense, which is not cured by a verdict; and though a dash would help it, yet they could not by intendment supply a dash, for that was to make another word. This was moved several times, and having rested two terms, the Court gave judgment for the plaintiff, saying, they must take the words of the declaration to be the very words of the promise, as if the words of the promise had been put in writing thus by the parties under their hands: In which case the Court ought not to pursue a grammatical sense or construction, which makes the promise void, but to construe it so as to make the parties mean somewhat, as it is plain they did, and that was to pay *tantum quantum habere meruerit.* Faresl. 106. 2 Ld. Raym. 835.

Vide 1 Salk. 43, 44. Lutw. 1084. to 1130.

QUARE IMPEDIT.

(*Vide* title *Presentation.*)

1. BERKELY *v.* HANSARD.

[Mich. 3 W. & M. B. R. Rot. 569.]

In quare impedit nonsuit after appearance is peremptory. Co. Lit. 139. a. 1 Brownl. 161.

IN a *quare impedit* against *A.* and *B.* and the bishop, *A.* and *B.* made title, and the bishop pleaded that he claimed nothing but as ordinary. The bishop died, *A.* came and surmised this upon the roll, and prayed the plaintiff might reply; upon this an entry was made, *Quod prædict. quer. licet solemniter exactus non venit, nec est prosecutus breve suum præd. ideo consideratum est, &c. & breve episcopo.* Upon this a writ of error was brought, and the judgment was affirmed: for it is a nonsuit after appearance, which in a *quare impedit* is peremptory. *Vide* 7 *Co.* 27. *b.* 2 *H.* 4. 1. *b.* 14 *H.* 7. 19. *b.*

S. C. 3 Lev. 377. and 382, 4 Mod. 200. Parliament Cases 164. Comb. 205, 300. Carth. 313. 1 Show. 413, 441, 493. Holt 585.

2. DOMINUS REX & DOMINA REGINA *v.* THE BISHOP OF LONDON *and* DR. LANCASTER.

[Trin. 5 W. & M. B. R.]

In case of a prerogative turn the writ is general, quæ ad nostram spectat donationem.

IN the great case of the *quare impedit* for the church of *St. Martin's in the Fields*, the defendant prayed *oyer* of the writ, and pleaded in abatement variance between the writ and the count; the first being *quæ ad nostrum donationem spectat*, the latter *quæ ad suam donationem spectat jure prærogativæ:* And on demurrer it was objected, that the title by the writ is a title in fee, this in the count is only a turn *pro hac vice; sed non allocatur;* for the precedents are so, and the writ is always general. *Shower pro def.* Suppose then the king should have judgment by default, and a writ to the bishop, would this gain a general title to the crown, and become a usurpation? *Holt*, C. J. No; for where the king hath judgment by default in a *quare impedit*, he, as well as a subject, must by suggestion on the roll set forth his special title. *Respondeas ouster* awarded.

3. DOMINUS REX *v.* THE BISHOP OF CHESTER, PEIRCE *and* COOK.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 292. S. C.]

IN a *quare impedit* the plaintiff declared, that Q. *Elizabeth*, on the 14th day of *February*, in the 12th year of her reign, was seised of the advowson of *Bedel*, *ut de uno grosso*, and presented *Syms*: That the queen died, and it descended to K. *James*, and he was seised *ut de grosso*: So to K. *Charles*, and that he was seised *ut de grosso*, and presented *Wickham*; and that afterwards *Wickham* died, and one *J. Peirce*, *non habens jus*, *sed usurpando præsentavit Metcalfe*: That K. *Charles* I. died seised, and it descended to K. *Charles* II. *&c.*

King's grant of an advowson. Vide Hob. 143. 3 Co. 4,5. 10 Co. 101. Owen 43. 1 Leon. 21, 201, 277. 6 Co. Doughty's Case. 5 Mod. 287, 335, 336, 297. S. C. Carth. 440. S. C. Parl. Cases 212. 3 Lev. 377. 4 Mod. 200. Hob. 224, 233. Mo. 413. 2 And. 32, 36, 154. 3 Salk. 24, 40. Cas. B. R. 185. Show. P. C. 212. Skin. 651.

Defendant pleads that K. *Charles* I. was seised in gross; but that he, after his presentation of *Wickham*, by letters patent, granted the advowson aforesaid to one *Thackston*, *adtunc armigero*, *postea militi*.

Et quod prædicto tempore quo Peirce is supposed to have usurped *super dominum regem*, *ipse idem Peirce usurpavit super dict. W. Thackston*, and presented *Metcalfe*: *Et quod postea* the said *Thackston* released the advowson, and his right therein, to him the said *J. Peirce* and his heirs, and traverses the dying seised of K. *Charles* I.

The attorney-general prayed *oyer* of the letters patent, which reciting that Q. *Elizabeth*, in the 13th year of her reign, granted the manor of *Bedel*, with the advowson *adinde spectan.* to the earl of *Warwick*, and that the said manor was come to Sir *W. Thackston*, Knt. *sciatus igitur nos dedissa & concessisse præfato Will'o Thackston mil. advocationem ecclesiæ prædict.*, and thereupon demurred to the plea. Judgment was given in *C. B.* for the king, and a writ of error brought; and thereupon it was objected, that the advowson which the king meant to pass, was an advowson which Q. *Elizabeth* granted to the earl of *Warwick*, and that the said grant to the earl of *Warwick* was void; for the queen, *anno* 12 *regni sui*, being seised of this advowson *ut de grosso*, could not *anno* 13. grant this as an advowson appendant, and that this is admitted by the defendant: And if this was an advowson in gross, and so descended to *Charles* I. his confirmation or grant to *Thackston* upon a supposal wherein he was deceived, will be void; and that the said *W. Thackston* in the letters patent, and the *W. Thackston* in the grant, appear to be different persons. On the other side it was urged, that the queen might be seised of this advowson as in gross at the time she presented, and at the time she died, and yet might be

seised of it as appendant when she granted it to the earl of *Warwick*, for she might have the advowson again after [561] the grant to the earl of *Warwick*, and then present; and that the Court ought to intend every thing to make the king's grant good. To clear this, the Chief Justice, *Rokeby* and *Eyre*, Justices, held,

Sufficient to lay seisin tempore pacis, tempore domini regis.

1st, That the time of the seisin laid in the count was immaterially alleged, for it is sufficient to say, *tempore pacis, tempore dominæ reginæ*, and therefore it is not traversable: In trespass *quare, &c.* it is necessary to lay a certain time; yet even there the precise time is not material nor traversable, but any time before the suing of the writ may be given in evidence, *a fortiori* here, *&c.*

That which is immaterial is not admitted by not being traversed. 1 Vent. 127. 2 Saund. 235, 180. 1 Lev. 92. 2 Lev. 112. 1 Mod. 72. Vide Str. 293.

2dly, That which is not material nor traversable is not admitted nor confessed when it is alleged, and not traversed. *Ergo*, as the plaintiff, upon *non present. modo & forma*, might give in evidence a presentation any time, so the Court may intend it. *Vide* 1 *Inst.* 352. *Hob.* 71. 2 *Leon.* 99.

In grants where the king's intent appears to pass the thing, it shall pass notwithstanding false recitals. Vide Hob. 143, 229, 230. 3 Co. 4, 5. 5 Co. 93. 3 Lev. 49. 1 Co. 43. a. 8 Co. 56.

3dly, The grant of the queen, as recited, is said to be *inter alia*, so there may be other words which are sufficient to pass an advowson in gross to the earl; and the intent of K. *Charles* I. is plain, and this consideration might be sufficient, as the relinquishing of a suit against the king, or the surrender of a void patent is a good consideration for a new grant. And as to the recitals, which were not all answered, *Holt*, C. J. said, Where it appears by the recitals the king intended not to pass any thing he had an apparent right in, but only what was concealed, the recital will qualify the grant; which is *Legat*'s case. 10 *Co.* But where there are words in the grant which shew the king designed to pass the land, though they were not concealed, there the grant shall be good to pass the lands. *Hard.* 231.

Grant to a knight by the name of esquire, is void. See 2 Inst. 663. 16 H. 6. 28. 18 H. 6. 8. 6 Co. 27. Litt. R. 81. Hard. 198. 1 Sid. 40. Farcsl 38. 2 Inst. 583, 594, 666. 2 Cro. 679. Litt. Rep. 121. 1 Bulst. 21. 4 H. 7. 7. 32 H. 6. 29. 8 Ed. 4. 23. 2 Inst. 594. Hut. 41. 9 Rep. 49. 2 Cro. 240. 1 Buls. 21.

4thly, *Holt*, C. J. *Turton* and *Eyre*, Justices, held, that *William Thackston*, Esq. in the plea, could not be *W. Thackston*, Knt. mentioned in the letters patent, for esquire is drowned in the name of knight, so that a knight cannot be an esquire; and a grant to *A. B.* Knt. is absolutely void, if *A. B.* be only an esquire. Knight is a name of dignity, and parcel of a man's name, as much as his Christian name. It was said that it should have been averred, that *W. Thackston* was *revera* an Esq., but *cognit. & reputat. miles* at the time of the grant; but that would not have aided it, for a man cannot be a knight by reputation, for there can be no foundation for such a reputation; and it is not the party saying in his plea, *I am the man*, that will explain the grant, but the identity must appear on the face of the grant itself. Upon this the judgment was affirmed by *Holt*, C. J. *Turton* and *Eyre* Jus-

tices; but *Rokeby*, J. held, that there was a sufficient *demonstratio personæ*, and that it ought to have been reversed (*a*).

(*a*) This judgment was reversed in the House of Lords; *Show. P. C.* 212. It was observed for the plaintiff in error, that, in case of grants, any description of the person is sufficient; and that it is the identity of the person which the law doth most regard and value. *Vide* the argument in *Shower*, where the several points arising on the case are elaborately discussed. The injustice which might result from the doctrine that an error in the description of a person would avoid a grant, and that the identity could not be shown, would in the present state of *English* jurisprudence prevent that doctrine from receiving much encouragement.

QUE ESTATE.

See Co. Lit. 303. 3 Lev. 19. 1 Lev. 190. 1 Salk. 363. 1 Mod. 231.

SCILLY *v.* DALLY.

See 5 Mod. 150. Post 629. 1 Lev. 190. 1 Sid. 298. 2 Sid. 10. Comb. 476. S. C. Carth. 444. Cases B. R. 190. Holt 610.

[Pasch. 10 Will. 3. B. R. Inter Hill. 9 Will. 3. B. R. Rot. 747. 1 Ld. Raym. 331. S. C.]

Commencement of particular estate must be shewn. 1 Mod. 231. 2 Mod. 143, 144. 2 Show. Cas. 426. Lutw. 80, 81. 5 Mod. 206. 3 Mod. 48. Cro. Jac. 418. 2 Vent. 182. 3 Lev. 193. Raym. 389. 2 Keb. 87, 96. 1 Sid. 279. Show. 64. 3 Lev. 133.

Diversity between counts and avowries.

IN *replevin* the defendant avowed and set forth, that *J. S.* was possessed of a messuage and 40 acres of land, setting out the time of the commencement of the lease, and demise, rendering rent, *&c.* And that he being possessed of the reversion died, and it came to his executor, and for rent-arrear he avowed. The plaintiff demurred, and shewed for cause that the avowant had not shewn who was lessor of *J. S.*: And for this it was held naught. *Per Holt*, C. J. In debt for rent it is enough to say *dimisit:* And if it be brought against an assignee, that he demised to such a one, whose estate the defendant hath, is enough for the lessor or his executor, (*quære tamen* of the heir,) without making a good title to himself; yet an avowry differs from a declaration in many respects (*b*). In a declaration in

(*b*) By stat. 11 *Geo.* 2. ch. 19. sec. 22. defendants in replevin may avow or make cognizance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon the distress was made, enjoyed the same under a grant or demise, at such a certain rent, during the time wherein the rent distrained for incurred which rent was then and still remains due; or that the place where the distress was taken was parcel of such certain tenements, held of such tenure, *&c.*; for which tenements the rent, *&c.* was at the time of the distress, and still remains, due; without further setting forth the grant, tenure, demise, or title of such landlord, *&c.*

debt for rent, *nil debet* is a good plea, and traverses the whole declaration; but there can be no general issue to an avowry, but some special point must be traversed; and therefore, because it does not appear out of what estate, or in what manner this term was derived, judgment must be for the plaintiff. *Vide Cro. Car.* 571. The reason why the commencement of particular estates must be shewed in pleading, is, because they are created, by agreement out of the primitive estate; and the Court must judge whether the primitive estate and the agreement be sufficient to produce the particular estate claimed: And this is a fundamental rule, which ought not to be broken upon fancied inconveniencies (*a*).

Johns v. Witney, 3 Wils. 65. Easter 10 Geo. 3. C. B. Same point; and this case of Sully v. Dally held to be good law. See Cro. Car. 138. Yelv. 74, 147. 3 Mod. 132. Lutw. 1492, 1497.

(*a*) This judgment was affirmed in *Dom. Proc.* 1 *Bro. P. C.* 77.

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[563]

RECOGNIZANCES, STATUTES, ELEGIT, EXTENT, &c.

Vide Faresl. 38 97. Hob. 196. Cro. Car. 148. Cro. Jac. 2, 12, 449, &c. Vide Cro. Car. 141, 149.

1. HAMMOND *v.* WOOD.

[Trin. 3 W. & M. B. R.]

Conusee cannot assign his interest after extent and liberate, if conusor continues in possession. Vide Faresl. 38, 97. Cro. Jac. 3, 12, 449. 1 Show. 281. 3 Lev. 312. 1 Vent. 42. 4 Mod. 48. S. E. 3 D. 166. p. 16. Skin. 300. Holt 611, 263.

THE conusee of a statute had lands extended and delivered to him upon a *liberate:* The conusor being in possession, continued his possession; afterwards the extended interest was assigned; and the question was, Whether it was assignable? The Court held not: It was objected, that before entry by the conusee, this was like an *interesse termini*, or the interest of one that has a lease to commence at a future day, which is assignable; so here the conusee hath an estate before entry. "*Sed per Holt*, C. J. By return of the extent an interest vested in the conusee: The end of the *liberate* is to have an actual possession of the interest; and it must be taken that he has by the return of the *liberate;* the sheriff returning thereupon *liberari feci*, the conusee is estopped to say otherwise: If then the conusor continues to keep possession after this return, the conusee's estate is turned to a right, like the case of disseisee making continual claim, as soon as ever the disseisee leaves the premises, the continuance of posses-

sion by the disseisor, makes a fresh disseisin. *Vide* 1 *Inst.* 156. *Lit.* 129. And this is not like the case of mortgagor, who continues in by consent, and not in opposition to the mortgagee.

2. PUTTEN *v.* PURBECK.

Vide Cro.Jac.12.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 346. S. C.]

On elegit if the sheriff deliver more than a moiety, the execution is void. 1 Vent. 259. S. C. Cases B. R. 355. Carth. 453. S. C. 1 Sid. 91, 239.

TO a *scire facias* upon a judgment, the defendant pleaded in bar, that the plaintiff had before sued an *elegit* on the same judgment, directed to the sheriff, who thereupon returned an inquisition taken, and a delivery of such certain parcels thereof (*a*). [*Et nota*, the parcels amounted to more than a moiety,] and prayed judgment, if the plaintiff should have any other execution; to which it was demurred; and the Court held that the execution was merely void; for the sheriff had only a circumscribed authority, and had exceeded it; and if the plaintiff had brought an ejectment, he could not have recovered the possession on this title, and therefore should be at liberty to pursue a more effectual execution.

[564]

(*a*) Separate lands may be extended, provided they do not appear to amount in value to more than a moiety of the whole. *Den* v. Ld. *Abingdon, Doug.* 472.

3. DOMINA REGINA *v.* EWER.

[Pasch. 1 Ann. B. R. 2 Ld. Raym. 756. S. C.]

Certiorari to remove an indictment not a supersedeas, unless recognizance entered into in 20l. Vide 1 Salk. 147, 148, 149. Faresl. 9, 120, 121. S. C. 3 Salk. 369. Holt 612. Vide Str. 1165. Bur. 10.

A *SCIRE facias* was brought on a recognizance taken before a judge upon granting a *certiorari* to remove an indictment from the sessions of the peace, which upon *oyer* was entered *in hæc verba*, and was for 40*l.* whereas the sum prescribed by the statute is 20*l.* *Et per Holt*, C. J. Before 5 & 6 *W.* & *M. c.* 11., any judge might take a recognizance, which is not taken away; but if it be not according to the statute, which is in 20*l.*, the *certiorari* will be no *supersedeas;* yet whether it be or no, it is still good as a recognizance at common law.

Vide post 600, 659. 6 Mod. 42. 2 Leon. 24.

4. SHUTTLE *v.* WOOD.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 966. S. C. by the name of Phettle *v.* Wood.]

In C. B. if recognizance be taken at a judge's chamber, it must be so declared on; but in B. R. as if taken in court. Vide Hob. 196. March 159. 6 Mod. 42, 132. S. C. Alcyn 12. 1 Cro. 312. S. C. 3 D. 314. p. 6. Holt 612. 2 Cro. 450, 645. Cro. Car. 481.

IN *debt* on a recognizance of bail in *C. B.*, the plaintiff declared that the defendant *per scriptum suum obligatorium recognit. in curia dictæ dominæ reginæ de Banco coram Thomæ Trevor mil. & sociis suis, &c.* Defendant pleaded *nul tiel record:* the recognizance certified, appeared to be taken before Mr. Justice *Nevel*, at his chambers. *Et per tot. Cur.* The plaintiff hath failed of his record, and hath varied in his description from the recognizance. *Et per Holt*, C. J. If it had been entered as taken in court, then it had been well enough. In this court the course is always to enter them as taken in court, though taken actually by a judge in his chamber, and in this court they are not taken in a sum certain, as in *C. B.*, neither are they a record till entered; but in *C. B.* it is a record immediately upon the first caption, and binds the lands before it be filed at *Westminster*, and when it is filed, then it is a record in court, and a *scire facias* or debt lies upon it, either in *Middlesex* where filed, or in *London* where taken; whereas on a recognizance in this court of *B. R.* the action or *scire facias* must always be brought in *Middlesex*.

Vide Lut. 1287. Barnes 96, 207. 2 Bl. Rep. 769. 1 Bur. 409.

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[565]

See 2 Saund. 254, 393. 6 Mod. 18, 245 257. S. C. 5 Mod. 8, 9. Holt 613. Vide 1 Sid. 429. 6 Mod. 103. Lutw. 332. 2 Salk. 298.

RECORDS.

1. WAITES *v.* BRIGGS.

[Mich. 6 W. & M. B. R. 1 Ld. Raym. 35. S. C.]

In escape the plaintiff did not allege the commitment prout patet per recordum, but well on general demurrer. Vide 3 Lev. 311. 1 Lutw. 111. See now the stat. 4, 5 Ann. c. 16. 1 Keb. 761.

IN *debt* for an escape the plaintiff declared the prisoner was committed and escaped, and because he did not say *prout patet per recordum*, the defendant demurred generally; but the plaintiff had judgment; for the gist of the action was the escape, and the commitment only inducement. *Et per Holt*, C. J. In debt on a judgment *quoad cum recuperasset*, is good without a *prout patet per recordum;* and the defendant may plead *nul tiel record*. *Et per G. Eyre*, J. The matter here is grounded on the fact, for *nil debet* is a good plea, and not on the matter of record.

And the rule in *Co. Lit.* 303., where the difference is taken between cases, where the record is the very foundation, and where inducement is a good diversity. *Vide* 1 *Sid.* 16. Judgment for the plaintiff.

1 Lev. 137. 1 Sid. 216. Hob. 210. 1 Saund. 336. 1 Salk. 238. Hob. 233. Show. 4. Faresl. 53. Vide Str. 1226.

2. DOMINUS REX *v.* NORTH.

[Hill. 8 Will. 3. B. R.]

Upon a certiorari the very record is returned. 6 Mod. 188.

PER Holt, C. J. It is an error in the clerks in *London*, that upon a *certiorari* they return only a transcript, as if the record remained below; for in *C. B.*, though they do not return the very individual record, yet the transcript is returned as if it were the record, and so it is in judgment of law.

3. THOMPSON *v.* LEACH.

S. C. ante 427. Post 576, 618, 675.

[Pasch. 9 Will. 3. B. R.]

Roll of precedent term ought to be filed. Vide 3 Lev. 219. S. C. Eq. Abr. 178. p. 3. 3 D. 164. p. 13. 3 Salk. 300. 1 Show. 296. 3 Mod. 296, 301. 3 Lev. 284. Show. P. C. 150. 2 Vent. 198. Comb. 488, 468. Carth. 211, 250, 435. Holt 357, 623, 665. Cases B. R. 475.

PER Holt, C. J. You ought not to move to read a word of a record, in order to make a *consilium*, where the roll is of a precedent term, unless it be filed; for you ought not to have a loose roll, unless it be a roll of that term of which it ought to be a record.

4. MOOR *v.* MANUCAPT. GARRET. [566]

[Mich. 10 Will. 3. B. R.]

Upon nul tiel record pleaded of record of the same court, day may be given to the party to bring it in, or for the justices to inspect the record; but defendant cannot demur. Vide 3 Lev. 243. S. C. Cases B. R. 214. Holt 558.

A *SCIRE facias* against bail; the defendant pleaded, that no *capias* issued forth against the principal; the plaintiff replied and set out the *capias prout patet per recordum*, *&c.* Defendant rejoins *nul tiel record.* Plaintiff sur-rejoins, *habetur tale recordum*, and prayed that the Court will inspect the rolls, *&c.* The defendant demurs, and the Court held this demurrer was ill: Upon *nul tiel record* pleaded, where it is a record of another court, the other party replies, *quod habetur tale recordum*, and the Court gives him a day to bring it in: But if *H.* pleads a record of the same Court, the other side may crave *oyer*, &c. (*a*), or may plead *nul tiel record*, and then there are two ways of proceeding in such case; for either the Court may give the party a

(*a*) *Vide* 1 *T. R.* 150. *contra.*

day to produce the record; which entry is, *et dictum est præfato, defendenti, quod habeat recordum hic tali die sub suo periculo, &c.*, or the Court may give day to inspect the record themselves. *Et quia justiciarii hic se advisare volunt super inspectione & examinatione recordi per prædict. defendentem superius allegati dies datus est partibus prædict. hic usq; &c. Vide Dy.* 228.

But in the principal case, what does the defendant do by his demurrer, but deny that the Court can inspect the records in the Court before them? which they may most undoubtedly; therefore judgment must be given against him.

5. ANONYMOUS.

[Trin. 11 Will. 3. B. R.]

Printed statute not evidence upon nul tiel record. 3 Lev. 243. Vide Str. 446. 3 Salk. 330. Sty. 122, 155, 462.

IN an action against *H.* defendant pleaded the composition-act; the plaintiff replied *nul tiel record;* upon the day given to bring in the record the defendant brought in the printed act. *Et per Holt,* C. J. An act printed by the king's printers is always allowed good evidence of the act to a jury (*a*); but was never allowed to be a record yet: You must get an exemplification under the Great Seal, and then plead it exemplified, and then no man can deny it.

(*a*) *Bull. N. P.* 225. In private acts of parliament the printed statute-book is not evidence, though reduced into the same VOLUME with the general statutes; but the party ought to have a copy compared with the parliament-roll, for they are not considered as already lodged in the minds of the people. However, a private act of parliament in print that concerns a whole country, as the act of *Bedford* Levels, for building *Tiverton,* &c. may be given in evidence, without comparing it with the record. And these things are the rather admitted, because they gain some authority from being printed by the king's printer; and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown: and, for this reason, printed copies of other things of as public a nature have been admitted in evidence, without being compared with the original; and the printed proclamation for a peace was admitted to be read, without being examined by the record in Chancery. A gazette which contains any thing done by his majesty in his character of king, or which has passed through his majesty's hands, is admissible evidence in a court of law to prove such thing. *Rex* v. *Holt,* 5 *T. R.* 436. *Vide* form of pleading an exemplification, 8 *Co.* 8. *b.*

6. TURNER *v.* BARNABY.

[Trin. 2 Ann. B. R.]

IN *ejectment*, the defendant being called to confess lease, entry, and ouster, made default, and that default was recorded. Afterwards the plaintiff would have waived it, supposing the record of it to be in the breast of the Court during the * term. *Et per Holt*, C. J. There is a diversity between an act of the Court done upon record, for that is in the breast of the Court, and may be altered by them during the term, and an act of the party recorded by the Court, as a nonsuit or default; for that once recorded, cannot be altered by the Court; for that would be a means of introducing falsity in matter of fact into records.

Act of the court upon record may be altered the same term, of the party, not. S. C. Ante 259. Post 649. See Ray. 69. 3 Lev. 219.

[* 567]

COMMON RECOVERIES.

Vide 1 Co. 14, 61. 2 Co. 74. 5 Co. 40. Lit. R. 234. 2 Lev. 31. 2 Mod. 70. Lutw. 1549. Post 591.

1. SIR JOHN ST. ALBANS'S *CASE.*

[Trin. 1 W. & M. C. B.]

SIR *John* St. *Alban's* being of the age of nineteen years, his sister, who was the next in remainder, and also his heir, married one of his footmen. He petitioned the king for leave to suffer a common recovery, who referred it to the judges of the Common Pleas, before whom several precedents of recoveries, suffered by infants upon privy seals, were cited, *viz.* One *Bivarny*, the 1st day of *June*, 10 *Car.* 1. One *Young*, the 23d day of *November*, 11 *Car.* 1. Another, 13 *Car.* 1. Another, 14 *Car.* 1. Another, 1 *Jac.* 2. Another, 4 *Jac.* 2., by *Toby*. Another, 4 *Jac.* 2. Another, by *John Croke*, son of Sir *John Croke*, 10 *Car.* 2. The judges observed, that seven of the petitions were by fathers upon the marriage of their sons, and an equal recompence given; whereas here was neither father nor marriage in the case; and they said this case had been carried too far already, therefore disallowed it. *Vide Hob.* 196. 1 *Ro.* 731. 1 *Cro.* 307. (*a*).

Recovery suffered by an infant. 1 Sid. 321. 2 Keb. 141. Styl. 246. Cro. El. 321. 1 Mod. 48, 246, 247. 3 Lev. 36. 1 Vent. 69. 2 Vent. 30, 90.

Vide 1 Vern. 461.

(*a*) Common recoveries suffered by privy seal are now disused, and private acts of parliament are universally substituted in their stead. 2 *Cruise* 81.

2. CLITHERO *v.* FRANKLIN & UX.

[Pasch. 2 W. & M. C. B. Rot. 207.]

To A. and his wife for life, remainder to the heirs male of A. on the wife begotten; A. cannot dock this during the wife's life. S. C. Lilly Ent. 92. 523.

IN a *writ of aycl* the issue was, Whether the grandfather died seised in fee? The jury found that the grandfather covenanted to stand seised to the use of himself and *Mary* his wife for their lives, remainder to the heirs male of the grandfather on the body of the said *Mary* begotten, with remainders over. The grandfather suffered a common recovery, and died; *Mary* survived. To prove the recovery void [*good*], it was insisted, that *Owen* and *Morgan's* case (*a*) was not law; for if baron and feme had an intierty, then each had the whole, and the baron might make a tenant to the *præcipe* for the whole. *Pemberton contra*, That case was never yet questioned; the wife's estate hinders the intail from executing in the baron; so that it is only a kind of contingent estate after the death of the wife, and the intail cannot be tacked to the estate for life of the husband, during the life of the wife; because during her life there is an intervening estate; and accordingly adjudged. 3 *Co.* 6. *Plo. Manxlo's* case 8, 9. 1 *Cro.* 320. 1 *Sid.* 83. (*b*).

(*a*) 3 *Rep.* 5. *a.*

(*b*) In this case the recovery must have been (as in *Owen* v. *Morgan*) with single voucher, and the grandfather tenant to the *præcipe;* so that part of the freehold being vested in the wife, the recovery could not be valid. But if the grandfather had conveyed the estate to a tenant without the concurrence of his wife, and come in as vouchee, it would have been sufficient. *Cappledike's* case, 3 *Rep.* 5. *Fitz William's* case, 6 *Rep.* 32. *Hallett* v. *Saunders*, 2 *Lev.* 107. Even in cases where the immediate inheritance in tail is vested in the wife, the husband may convey the freehold by deed, and make a good tenant to the *præcipe ; Cruise* on Recoveries, 29. *Butl. n. Co. Lit.* 325, *b. Pigott* 72. *Gilb. Ten.* 108. *Co. Lit.* 273. *b.* If there are two joint-tenants, and a recovery is suffered against one of them, it is good for a moiety, Marquis of *Winchester's* case, 3 *Rep.* 1. Upon a limitation to a man and woman who afterwards intermarry, they take by moieties, *Hallet* v. *Saunders, ubi sup.* By stat. 14 *Geo.* 2. ch. 20. it is not necessary to obtain surrenders from lessees for lives in order to make a good tenant to the *præcipe;* but the first tenant for life, or other greater estate expectant on the determination of such leases, must join in conveying an estate for life to the tenant. *A.*, tenant for 99 years, remainder to trustees for preserving contingent remainders, remainder to the first and other sons of *A.* in tail, *A.* and his eldest son joined in fine to make a tenant to the *præcipe*; it was held that the fine of tenant for years was void, and so no freehold conveyed; *Dormer* v. *Packhurst*, 3 *Atk.* 235. 4 *Bro.* 405. *A.* tenant for life, remainder to *B.* in tail; *B.* recovered in ejectment against *A.*, and being in possession by feoffment made *C.* tenant to the *præcipe*, and suffered a recovery: *A.* in a subsequent ejectment recovered against *B.*, and it was ruled that the feoffment of *B.* did not convey an estate of freehold to support the recovery; *Atkyns* v. *Horde*, 1 *Bur.* 60. 5 *Bro.* 241. *Cowp.* 689.

3. LLOYD *v.* EVELIN.

S. C. 1 Show. 347.

[Pasch. 5 W. & M. B. R.]

Tenant by fine, &c. Vide Noy 126. 1 Mod. 170, 262. Vide Skin. 3, 63. Butl. Co. Lit. 203. b n. 1. Cruise 26.

IN a *writ of error* of a common recovery, the tenant to the *præcipe* in the common recovery was made by a fine, the recovery was suffered, and the fine was reversed, yet it was held a good recovery; for there was a tenant to the *præcipe* at the time.

4. LACY *v.* WILLIAMS.

S. P. 1 Show. 347. 1 Mod. 218

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 227, 475. S. C.]

If tenant gain the freehold at any time before judgment, good. Vide Cro. Jac. 455. Lutw. 1549. Carth. 472 S. C. Comb. 425. Cases P. R. 261. Holt 614.

ERROR of a judgment in *C. B.* in ejectment, wherein a special verdict was found, *viz.* that a writ of entry was brought against *Miles Corbet, ret. Quindena Martini.* That upon the return *Miles Corbet* appeared, and the demandant counted against him, that he vouched *Lacy* the tenant in tail, and a summons *ad warrantizandum* issued, returnable *octabis purificationis.* After the *teste* and before the return of the writ of summons, *viz.* the 1st day of *January*, *Lacy* the tenant in tail conveyed to *Miles Corbet* by lease and release for life. At the return of the summons, *Lacy* the tenant in tail appeared and entered into the warranty, and vouched over the common vouchee, and so a common recovery was had. This recovery being held good in *C. B.* serjeant *Pratt*, for the plaintiff in error, insisted, that *Miles Corbet* was not tenant to the *præcipe* at the return of the writ of entry. He agreed that if he had purchased before the return of the writ of entry, the recovery had been good, (otherwise if after, as in this case,) to bind strangers or the issue in tail, though it might be good between the parties by way of estoppel. *Vide* 1 *Ro.* 868. 21 *E.* 3. 5. 5 *H.* 6. 1. 18 *E.* 4. 26. 9 *E.* 4. 12. 3 *H.* 6. 34. *Ratio est*, because the tenant could not render the lands at the return of the writ of entry, and a voucher supposes a seisin; for it is a good counterplea that the voucher had nothing in the lands at the time of the voucher, and the *nec unquam postea* is not material; and if the tenant pleads not *non-tenure* as he ought and might, that only binds himself and those that are parties and claim under him by estoppel.

[569]

Kene contra argued, that the issue shall be bound where he may have execution for the value. 3 *Co.* 5, 6. 12 *E.* 5. 19. And it is not a sufficient counterplea of a voucher to say, the voucher had nothing *tempore, &c.* without adding *nec unquam postea.*, *Rast.* 367, 126. So it is of *non-tenure*,

Rast. 273. Where the tenant appears on the return of the writ of entry, and a recovery is then had, in such case the tenant must have the freehold at the return of the writ because it is a recovery then suffered; but otherwise where there is a voucher over, or interpleader, as in this case; for it is sufficient if he become tenant before judgment. 41 *E.* 3. 5. 8 *E.* 3. 32. 10 *E.* 3. 21.

1 Roll. Abr. 865.

Brook, Brief, pl. 75, 77. 1 Inst. 102, 365. Hob. 21. Non-tenure cured by subsequent purchase. Q. 1 Mod. 218. 1 Show. 317. Lutw. 1549. Post 601. 2 Lev. 29, 55. 2 Lutw. 1548.

Holt, C. J. It is not enough in a counterplea of a voucher to say, the voucher had nothing in the lands at the time of the voucher, without *nec unquam postea;* so it is of *non-tenure:* If the tenant to the *pracipe* gains a freehold before judgment, it is sufficient, for it cannot be said to be a recovery against him that had nothing; therefore a writ may be made good by a subsequent purchase, and so may a voucher: and it is the more reasonable, because the demandant may have a good cause of action, though the tenant have not the land; for it is not his being tenant to the *præcipe*, but the demandant's having a right to the land, that is the foundation and cause of action; and therefore it is in law sufficient, if the tenant have the land to render at any time before judgment (*a*). And the judgment was affirmed *nisi causa.* Afterwards Mr. *Squib* came to shew cause why the judgment should not be affirmed, and cited 18 *E.* 3. 13. 18 *E.* 4. 26. 2 *Ro.* 746. *Sed non allocatur:* And *Holt*, C. J. said, The recompense in the case of common recoveries was *ratio una*, but *non unica;* for a reversion expectant is barred by a common recovery, and yet the recompense cannot extend to that; which he said was a bold advance in favour of common recoveries (*b*). This rule was made absolute.

(*a*) By stat. 14 *Geo.* 2. ch. 20. recoveries shall be good notwithstanding the fine, or deeds making tenant to the writ, should be levied or executed after the time of the judgment given in such recovery and award of writ of seisin, provided the same appear to be levied or executed before the end of the term, *&c.* in which such recovery was suffered, and the persons joining in such recovery had a sufficient estate and power to suffer the same. *Goodright ex dem. Burton* v. *Rigby*, 2 *H. Bl.* 46. 5 *T. R.* 177. A recovery was held good, although the tenant did not acquire the estate until after the day on which the writ of seisin was returned to have been executed.

(*b*) Recoveries are now considered by the Courts as common assurances, which it is useless and absurd to examine, according to any original principles. *Taylor ex dem. Ath* v. *Horde*, 1 *Bur.* 115. *Selwin* v. *Selwin*, 1 *Bl.* 254. *Martin* v. *Strachan*, 1 *Wils.* 73. *Doe ex dem. Crow* v. *Baldwere*, 5 *T. R.* 112.

6. PAGE v. HAYWARD.

Piggot on Recoveries, 176, &c. S. C. more full than in any other book.

[Trin. 3 Ann. B. R.]

NICHOLAS SEARLE by his will devised to his niece *Mary Bryant* and the heirs male of her body, upon condition and provided that she intermarry with and have issue by one surnamed *Searle;* and in default of both conditions he devised to *Eliz. Bryant*, [in the same manner,] and in default thereof he devised to *George Searle* for sixty years, if he so long live, remainder to the heirs male of the body of the said *George*, and their issue male for ever. *Mary*, and *Elizabeth* with her husband, (for she had then married one *Cliff*,) joined in a fine to make a tenant to the *præcipe*, who was one *Isaac Savery*. *Isaac Savery* vouched *Mary Bryant*, *Eliz. Cliff*, and her *husband*, and the wife of the devisor with her husband, she being again married, and vouched them all jointly, and they vouched over the common vouchee. *Et per Holt*, C. J. & *tot. Cur.* it was adjudged,

S. C. 3 Salk. 96, 135. Rep. A. Q. 61. Holt 618.

1 Saund. 180. 2 Lev. 21, 22. 1 Lev. 212. 1 Leon. 283. 1 Vent. 199 to 305. 10 Co. 41. 1 Mod. 86. 3 Mod. 20.

1st, That the estate devised to *Mary* was a good estate-tail, and so was the estate to *Elizabeth;* but it is a special intail; it is an estate to her and the heirs male of her body begotten by a *Searle*, which is a middle intail; not the highest nor the least; for it might have been to her and the heirs of her body, begotten by *J. Searle*, which had been more particular; yet this is a good estate-tail within the statute *de donis*, for it is within the reason of the statute.

To A. and the heirs of her body by one of the name of Searle is tail. Vide post 619, &c.

2dly, The words, upon condition, &c. though they are express words of condition, shall be taken to be a limitation; so it is held in 1 *Vent.* 199, 202. And *Holt*, C. J. said, he saw no reason why they might not be so construed in a deed, though the law had not been carried so far; and so the sense is, if she had no issue by a *Searle*, upon her death, the estate shall remain over.

Words sounding conditional taken as limitation in a will. Vide 2 Co. 72, 73, 74, &c. Str. 1092. Doug. 63. 4 Bur. 1931. Fearne C.R. Cruise 134.

3dly, That the estate-tail of *Mary* and *Elizabeth*, or either of them, does not cease by marrying one that is not a *Searle;* for the remainder over is in default of both conditions, and in the mean time it is limited to her and the heirs male of her body, and she may survive the first husband and marry a *Searle*, and so there is a possibility as long as she lives.

Vide 1 Bro. Ch. 55. Randal v. Payne.

4thly, If the estate had been to *Mary* and the heirs male of her body by a *Searle* to be begotten, provided and upon condition, if she do marry any but a *Searle*, that then it shall remain and be to *J. S.* and his heirs; a common recovery suffered before marriage will bar the estate-tail and remainders; and though she after marry with another,

Condition that runs with the land cannot be barred by recovery, otherwise of condition collateral.

it shall not avoid the recovery: And the Court took a difference between a collateral condition and a condition that [571] runs with the land. If the donor reserve a rent with a condition to re-enter, a recovery will not bar it; otherwise if it be to re-enter for non-payment of a sum in gross. *Vide* 1 *Mod.* 108, 111. 2 *Lev.* 28, 60.

Vi. 4 Bur. 1936.

And as to common recoveries (being of great use) the Chief Justice desired to speak largely.

Tenant in tail, and he in remainder may be vouched jointly. Noy 81, 82. 3 Co. Cupledike's Case, 1 And. 275. Vi. 2 Atk. 324 Cruise 114. 1 Inst. 376. a.

1st, If tenant to the *præcipe* vouches tenant in tail in possession, and him in remainder jointly, and they jointly vouch over the common vouchee, this is good; not but that it may be more regular, that the tenant vouch *Mary Bryant*, and she *Elizabeth*, and she over the common vouchee, that the recovery in value may not be joint, but enure severally. Yet the other way is sufficient; for where in adversary action a *præcipe* is brought against several, it is enough that one hath the tenancy of the land; and if he would plead that he is sole tenant, and traverse that the others have any thing, the defendant may admit that, and proceed as to him, and the writ shall only abate as to the rest; also the others may disclaim; and as a joining a stranger with a tenant does not hurt, so a joining a stranger with a vouchee does not; for he is but *in loco tenentis*, a tenant by the warranty. 20 *E.* 3. 10. 2 *E.* 3. 8. *Br. Several tenancy*, 3, 4. 10 *H.* 6. 14. *Rast.* 276.

If tenant vouches a stranger, who vouches tenant in tail, and he enters into warranty, it is good. 1 Vent. 358. 2 Co. 60, 61. Cro. El. 562.

2dly, If tenant in tail makes a tenant to the *præcipe*, and he vouches a stranger, and the stranger vouches a tenant in tail, and he the common vouchee, that is good; for his being a stranger is not material, because in judgment of law he has become tenant by the voucher to the *præcipe*, and a release to him is good, and the voucher is good whether there be a real warranty or not. At common law, if a stranger was vouched, the demandant could not counterplead it; but by *West.* 1. *c.* 40. he may, if he be absent, counterplead the voucher, *viz.* that the voucher and his ancestors never had any thing in the land; not if he be present. It is enough that tenant in tail comes in and owns a warranty, for there may be a warranty. Suppose an adversary action against tenant in tail who has a warranty, and he makes a feoffment in fee with warranty, or has levied a fine with warranty, and the feoffee or conusee vouch the tenant in tail, he may make use of his warranty, and yet he was not seised of the estate-tail; but in that case he may dereign the warranty, and then he recovers in recompense of his estate-tail; for whenever tenant in tail comes in as vouchee, he comes in in privity of all estates he ever had, and consequently may dereign the warranty. *Vide* 1 *Inst.* 385. *a.*

Tenant in tail coming in as vouchee comes in in privity of all estates he ever had. 3 Co. 60, 61. Plowd. 8. a.

And the Chief Justice said, The vouchee's being a stranger was not material; because, though there be no real warranty, the recovery in value is the same, and the admittance of tenant in tail has made it real.

RECUSANTS.

Vide 1 Lutw. 201, 208.

(*Vide* title *Church of England.*)

DOMINA REGINA *v.* PEACH.

[Mich. 3 Ann. B. R.]

A DISSENTING minister having qualified himself according to the toleration act in one county, kept a conventicle in that county; and afterwards removed into another, and kept a new conventicle without a new qualification. The justices convicted him, notwithstanding the toleration act. The attorney-general moved for an attachment against the justices, but it was denied; then he moved for a *mandamus* to permit him to preach, and that was denied also. The Court held, 1st, That a *mandamus* is always to do some act in execution of law, whereas this would be in nature of a writ *de non molestando*. 2dly, That a dissenting minister is still liable to the old penal laws for preaching in conventicles unless he qualify himself according to the act of toleration. 3dly, That a licence inrolled at the sessions in one county, will not extend to another county; but he must have a licence inrolled in the county where he preaches. But *note;* The law is since altered in this particular, by the act for preserving the Protestant religion, by better securing the church of *England.* 10 *Annæ.*

Licence to dissenting minister inrolled in one county, does not extend to another. 6 Mod. 228, 310. S. C. Post 673.

Noy 117. Lane 60. 1 Lutw. 208. 4 Leon. 54. 2 Cro. 142. 3 Lev. 61.

RELEASE AND DEFEAZANCE.

[573]

Vide Faresl. 74, 75. 2 Saund. 48, 96. S. P. Post 575.

1. ALOFF *v.* SCRIMSHAW.

[Trin. 1 W. & M. B. R.]

IN debt on a bond for 1000*l.* the defendant pleaded a covenant since made by the plaintiff, whereby he covenanted not to sue for the said debt upon the said bond,

Covenant not to sue for a certain time is not a release or defea-

zance. Raym. 187, 393, 413. S. C. 1 Show. 46, 47. Comb. 123. Carth. 63. Holt 619.

for and during the term of 99 years: This was held naught upon demurrer, for it is but a mere covenant, and doth not enure as a release or defeazance, and so cannot be pleaded in bar. *Vide* 1 *Cro.* 352, 623. 1 *Ro.* 939. 21 *H.* 7. 24. (*a*)

(*a*) The ground of the decision in this case appears to be, that a personal action once suspended by the act of the party is gone forever; *ante* 302. *Dyer* 140.; therefore the covenant must be either an absolute discharge, or a mere covenant; the former of which, being manifestly repugnant to the intent, shall not be implied. The same point was ruled in *Dowse* v. *Jeffreys*, 1 *Rol.* 939. 11 *Vin.* 461. But it was held in that case, and also in this, according to the Reports in *Show.* and *Comb.*, that a covenant not to sue generally will operate as a release. The same was ruled in *Searville* v. *Edwards*, cited 1 Ld. *Raym.* 420.

2. CLAYTON *v.* KYNASTON.

[Hill. 10 Will. 3. B. R. Intr. Trin. 10 Will. 3. B. R. Rot. 246. 1 Ld. Raym. 419. S. C.]

One deed not to be construed as a defeazance of another without necessity. Vide Cro. Car. 426. Cro. Jac. 300, 623. 1 Lev. 272. Post 575. S. C. 3 Salk. 298 Cas. B. R. 221, 415, 548. Holt 178, 218.

CLAYTON, the executor of *Clayton*, the executor of *Wintershall*, brought covenant against *Kynaston* upon articles, and declared as on articles made between *Killigrew* and the said *Kynaston*, and others *ex una parte*, and *Wintershall ex alterea parte*; wherein it was covenanted, that if *Wintershall* should be minded to give over acting plays, and should give notice in writing three months before he left off, and then three months after such notice in writing, *Wintershall* should be allowed for every acting day 5*s. per* day, and that after the death of *Wintershall*, 100*l.* should be paid to his executors within three months; *provided such notice* should not be given but in an acting week; and for breach assigns that 100*l.* was not paid within three months after *Wintershall's* death. The defendant pleaded that at the same time another deed was made between the said *Wintershall* of the one part, and the said *Kynaston* of the other part, wherein was contained the same agreement; and then it was farther covenanted by *Wintershall* in the same deed, that in case he gave notice as aforesaid, then the said *Kynaston* should be discharged of all debts, and be indemnified and saved harmless from all agreements or securities at any time before made, or hereafter to be entered into; then he avers notice was given, and that three months elapsed, &c. and so relies upon this as a defeazance. To this there was no demurrer.

[574] 1st, It was urged for the defendant, that this was a defeazance; for whatever the defendant lost in this action would be recovered against him on his covenant, which was but circuity of action. *Vide* 1 *And.* 307. *Mo. pl.* 80.

2 *Saund.* 47, 48. One deed a defeazance to another made at the same time with it. *Vide* 1 *Inst.* 265. Rebutter founded on the same reason.

The Court agreed, that if *A.* be bound to *B.*, and then *B.*, reciting this bond, covenants to save him harmless, this is an absolute defeazance; and if it be to save him harmless on a contingency, it is a conditional defeazance, because it hath an express relation to the deed; but in the principal case there is not a relation between the deeds; but on the contrary, the plaintiff's deed is only to indemnify against all covenants heretofore made, or hereafter to be made. There is therefore no necessity to construe the defendant's deed to be void and useless as soon as made, or that one deed has destroyed the other which was made at the same time with it, or that *Kynaston* may play fast and loose at his pleasure. Also the Court agreed, that where two are jointly and severally bound in a bond, a release to one discharges the other; and in such case, if the joint remedy is gone, the several is gone too; and that in the case at bar, the joint remedy was lost. But the Chief Justice, who delivered the opinion of the rest, said, they did not determine, that on covenant, where the joint remedy failed, there could not be a several remedy.

Vide 1 T. R. 446. 3 Lev. 41. Com. 139. 2 Ven. 218.

2dly, It was objected to the declaration, that he declares of a deed made between *Kynaston* of the one part, and *Wintershall* of the other, and does not say *prædict. Wintershall*, for want of which he does not appear to be the same person. This exception was not much heeded. Cases cited *pro* and *con* were *Yelv.* 103. 3 *Cro.* 913. *Bridgm.* 99. *Dyer* 70. *Hard.* 178.

3dly, It was objected to the plea, that the notice is not said to be given in an acting week; and though it was urged to be by way of proviso, and therefore ought to come on the other side, (5 *Co.* 78. 3 *Cro.* 405. 7 *Co.* 10. *Poph.* 28. *Plo.* 376. 1 *Leon. pl.* 202.) and that the plea said he had notice *secundum formam & effectum articulorum;* yet *Holt*, C. J. answered, that where the proviso goes by way of defeazance, it must be pleaded by him that takes advantage of it; but this is not so, but alters the sense of the covenant, by explaining and tying up the notice to a particular time, which would not have been understood on the general covenant, by which means it becomes a part of the covenant, so that you must plead accordingly; and, *secundum formam & effectum articulorum* is only matter of conclusion, which cannot serve without premises. And, upon this single point (*a*), judgment was given for the plaintiff.

Where a proviso goes by way of defeazance of a covenant, it must be pleaded on the other side; otherwise where, by way of explanation or restriction of the covenant. Vide 7 Co. 10.

(*a*) *Quære?* for by the report in Ld. *Raym.* and *come semble* by this report, the opinion of the Court was with the plaintiff on the first point; *et vide infra.*

3. LACY v. KYNASTON.

[Pasch. 13 Will. 3. B. R. 1 Ld. Raym. 688. S. C.]

Defeazance must contain proper words of defeazance. Vide 9 Co. 52. 3 Lev. 275. 1 Show. 151. 2 Lev. 214, 215, &c. Ante 573. S. C. 3 Salk. 298. Cas. B. R. 221, 415, 548. Holt 178, 218. 1 Rol. 939. 1 Show. 46. 3 Cro. 623. Comb. 123. 3 Cro. 352.

THE plaintiff brought covenant as administrator to *Lacy*, and declared on the same indenture in the case before between *Kelligrew* and *Kynaston*, and they *ex una parte*, and *Lacy ex altera parte*, reciting former articles, and they hereby covenant jointly and severally with *Lacy*, that if he be minded to leave acting, and gives three months notice thereof to the company, he shall be paid 6*s*. 3*d*. *per* day for his life, and that within three months after his death his executors shall be paid 100*l*. And that if he die without such notice, his executors shall be paid 100*l*. within six months after his death, in the nonpayment whereof the breach was assigned. The defendant craved *oyer*, and pleaded another deed made the same day and year, whereby *Lacy* and others covenant jointly and severally with the defendant, that if he left off acting, and gave notice, he should be freed and indemnified of and from the said covenant, and avers he left off and gave notice, and became discharged, and so prayed judgment of the action. The plaintiff demurs, &c. And the question was, Whether this was a covenant or a defeazance? And the Court held,

3 Lev. 275. 1 Show. 46, 47, 151. 2 Lev. 214, 215, &c. Bond from A. and B. to H. joint and several covenant from H. not to sue A., is not a defeazance. S. C. ante 573.

1st, That this covenant in its nature was not a defeazance, because it wanted words of defeazance, *viz*. that the thing be void.

2dly, If *A*. and *B*. are jointly and severally bound to *H*., and *H*. covenants with *A*. that he will not sue *A*., this is not a defeazance, for still there is a remedy on the bond gainst *B*.; otherwise if *A*. only had been bound, for then such covenant excludes him from any remedy for ever, to avoid circuity of action. *Vide* 43 *Ass*. *pl*. 44. This difference being applied to the principal case rules it, and it is but reasonable; because to construe this to be or enure as a release or defeazance, is to discharge all; otherwise of a covenant. 34 *H*. 8. *Br*. *Estranger al fait*. 21 *Lit*. *sect*. 376. *Inst*. 232. *Hob*. 66.

Post 578. Com. Rel. E. 1.

4. TOPHAM v. TOLLIER.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 786. S. C.]

Release of all demands to the personal estate of the intestate, releases not a bond be-

DEBT *on a bond* against an administrator; the defendant pleaded a release, whereby the plaintiff reciting there were several controversies between the defendant and him about a legacy, and the right of administration,

releases to the defendant all his right, title, interest, and demand of, in, and to the personal estate of the intestate. Upon demurrer this was held no plea; for, *per Holt*, C. J. there is a difference between a release of all demands to the person of the administrator, *as in *Yelv.* 214., and to the personal estate, as in this case; for the bond is not any right or demand to the personal estate till judgment and execution sued out.

fore judgment and execution. 3 Leon. case 105. cont. Vide 10 Co. 48 to 52. Holt 621. S. C. Cro. El. 897. Lutw. 249, 250. 1 Lev. 99, 272. 2 Lev. 210. Post 578. 2 Cro. 170, 222. Yelv. 156. 3 Lev. 274. Show. 150. Carth. 119.

[* 576]

REMAINDER.

Vide post Reversion, p. 590.

1. CORBET *v.* TICHBORN.

[Pasch. 6 W. & M. B. R.]

EJECTMENT, and trial at bar; the case was, *J. S.* was tenant for life, remainder to his wife for life, remainder to his first, second, *&c.* sons in tail, remainder to the right heirs of *J. S.* The said *J. S.* commits treason, and then has a son, and then is attainted; and the Court held, that whether the son was born before or after the attainder, the contingent remainder to him was not discharged by the vesting in the Crown during the life of *J. S.*, because of the wife's estate, which is sufficient to support it.

Attainder, vide post 630.

Vide Fearne's C. R. 426. (209.)

2. THOMPSON *v.* LEACH.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 313. S. C. Comyns 45. S. C.]

Ante 427, 565. Vide post 618, &c. ib. 3 Lev. 284. 3 Mod. 296.

A DEVISE was to *Simon Leach* for life, remainder to his first, second, and third sons, *&c.*, remainder to Sir *Simon Leach* in tail, the remainder to the right heirs of *Simon Leach*: *Simon Leach* the tenant for life surrendered his estate by deed to Sir *Simon Leach*, and after that had a son born and died, and the son brought an ejectment against Sir *Simon*, and *Simon* his father was found to be *non compos* at the time of the surrender. *Et per Cur.* Taking the surrender to be voidable only, it was held, that the plaintiff could have no title; for his estate in remainder

Surrender of tenant for life being non compos to a remainder man is void, and cannot bar contingent remainder. Right of entry will support contingent remainder, right of action not. 1 Vent. 306.

1 Roll. Rep. 177. Eq. Ab. 178. p. 3. S. C. 3 D. 164. p. 13. 3 Salk. 300. 1 Show, 296. 3 Mod. 296, 301. 3 Lev. 284. 2 Vent. 198. Comb. 438, 468. Carth. 211, 250, 435. Holt 357, 623, 665. Cases B. R. 475. 1 Co. Arches's Case. 2 Saund. 382, 383. 1 Vent. 190. 3 Mod. 301. 2 Vent. 198 to 208. 1 Show. 296. 11 Co. 80. 3 Keb. 177. 2 Jo. 2, 77. 3 Keb. 178, 244. F. C. R. 431.

was a contingent remainder, and if the precedent estate was gone and determined by the surrender, the contingency could not arise. There must be a particular estate actually in being (*a*), or a present right of entry, [*vide Bigot* and *Smith*'s case, *Cro. Car.*] And it is not enough that there be *a right of action, but it must be a right of entry. And they held, that it was not for want of right to the thing, but of capacity to do the act, that a madman is hindered to avoid his own grant. 1 *Cro.* 102. 2 *Saund.* 387. 3 *Keb.* 2. And if this had been done in the life of the surrenderer by inquisition, that would have preserved the contingent remainder; but that cannot be done now, because the particular estate is determined. To shew this, *Holt*, C. J. said,

[* 577]

If there be tenant for life, with a contingent remainder to *H.*, and tenant for life is disseised, and after that a discent cast, and five years expire, now the contingent remainder is gone, for there is nothing now to support it, the right of entry being turned into a right of action; But before the discent the right of entry was sufficient.

But they held the surrender in this case to be merely void, so that the particular estate remained in him, notwithstanding the surrender, and the contingent remainder rightly vested (*b*).

The right of entry must be present.

If there be tenant for life with a contingent remainder, and he makes a feoffment in fee upon condition, and the contingency happens before the condition broken, the contingent remainder is destroyed; for there must be a particular estate, or a present right of entry when the contin-

(*a*) The following distinction is taken by Mr. *Fearne*, concerning the union of the particular estate with the next vested remainder. If it is by immediate descent from the person by whose *will* the particular estate and contingent remainders are limited, the particular estate is not merged, or the contingent remainder destroyed; but, if the descent is mediate, it is otherwise.

The same distinction is taken between the cases where a particular estate is limited with a contingent remainder over, and afterwards the inheritance is subjoined to the particular estate by the same conveyance, and those cases where the accession of the inheritance is by a conveyance, accident, or circumstance distinct from that conveyance which created the particular estate; page 503 (266) to 508 (271). A contingent remainder in a copyhold is destroyed by the expiration of the particular estate before the contingency happens; but not by the surrender or forfeiture of the particular tenant; *Gilb. Ten.* 249. *Fearne* 471. (245.); or a conveyance to him of the estate in remainder, 2 *Vern.* 243.

It seems that, in those cases where the legal estate is devised to and vested in trustees in trust, there is no necessity for any preceding particular estate of freehold to support contingent limitations; *Fearne* 449. (230.) *Temp. Talb.* 44, 145. 1 *Vez.* 268. 1 *Atk.* 581.

(*b*) On the authority of this case, *Lee*, Ch. Just. in *Yates* v. *Boen*, *Str.* 1104., permitted lunacy to be given in evidence on *non est factum*, and the plaintiff on the evidence became nonsuited.

gency happens; but if tenant for life enters for breach before the contingency happens, the contingent remainder is received (*a*), and may vest (*b*).

(*a*) In *Bacon's Abridgment*, vol. 4. pa. 315., a different opinion is delivered; because the feoffment, though upon condition, was a forfeiture and determination of the particular estate, and the recovery does not purge the forfeiture. But Mr. *Fearne* infers, from the authority of *Co. Lit.* 202. *b.* 1 *Rol. Abr.* 474. pl. 4. [5 *Vin. Abr.* 317.] where it is held, "that the estate is reduced, but the forfeiture not purged," that the opinion here expressed is agreeable to law.

(*b*) Judgment affirmed, *Sho. P. C.* 150.

3. WEEKS *v.* PEACH.

[Mich. 13 Will. 3. B. R.]

H. DEVISED out of his lands a rent to one for life, with remainder over, *&c.* And *Shower* objected, that there could not be a remainder of a rent *de novo;* for there cannot be a remainder where there cannot be a reversion. But *per Holt*, C. J. there may be a remainder of a rent *de novo;* for the intent of the party gives it first a being for the whole, and then the lesser estates are carved out of it. *Vide* 2 *Lutw.* 1225.

Remainder may be of a rent de novo. Vide ante 466. 1 Lev. 144. Q. Chan. Cas. 79, 80. 1 Sid. 285. 6 Mod. 112. 1 Mod. 218. 2 Lev. 80, 88. Carter 52.

2 Keb. 89. Co. Lit. 298. a. Butl. note 2. 3 P. Wms. 230.

RENTS.

[578]

1 Lev. 22, 25, 43, 144, 170. 2 Lev. 30, 80, 240. 3 Lev. 39, 150, 233, 295.

1. STEPHENS & UX. *v.* SNOW.

[Hill. 2 W. & M. B. R.]

THE plaintiff declared upon a lease for years, *reddend.* 30*s.* at *Lady-day* and *Michaelmas*, and assigns for breach non-payment of a year's rent due, and ending at *Lady-day* 1689. The defendant pleaded a release dated the 18th day of *November* 1688, of all demands; and, upon demurrer, judgment was given for the plaintiff; for the growing rent not due, which is incident to the reversion, was not discharged; though the first half year's rent, which was a duty demandable, was released; but here the

Growing rent not released by release of all demands. Vide ante 575. pl. 4. 10 Co. 48 to 52. 1 Lev. 99, 100. 2 Lev. 210. 1 Ven. 314. 1 Sid. 141. 2 Cro. 170. Lit. sec. 510. 1 Mod. 95. 2 Cro. 486. Co. Lit. 292. b.

release being pleaded as a bar to all, which it is not, the plea is naught, and judgment must be given for the plaintiff.

2. LORD ROCKINGHAM & AL. *contra* OXENDEN & AL.

[*Coram* Trevor, *Master of the Rolls*, 1711.]

1 Will. Rep. 177. S. C. by the name versus Penrice. Cro. Jac. 310. Cited and approved, 4 T. R. 173. Vi. stat. 11 G. 2. ch. 19.

THE lessor dies upon *Michaelmas-day*, between three and four in the afternoon, before sun-set, the rent being reserved payable on *Michaelmas-day*. The question was, Whether the executor or the heir, or, which is the same, the jointuress of the lessor should have this rent? The executor insisted that this was the rent day; that it might have been paid in the morning, and that a release upon such payment had been a discharge; and they denied the opinion of *Hale* in 1 *Saund.* 287., and said, that so it was held by the judges of assize at *Durham*, *viz.* Baron *Bury*, *&c.* But on the other side it was argued and decreed, that the rent should go to the heir or jointuress, because at the time of the death of the lessor, there was no remedy nor means to compel the payment thereof. *Vide* 10 *Co. Clun's* case. 2 *Bulst.* 293. *Plowd.* 172, 173. 1 *Inst.* 202. 1 *Keb.* 59. 1 *Sid.* 162. 2 *Cro. Fox* versus *Whichcot.*

REPLEADER.

Vide Cro. El. 318, 883. 3 Co. 52. 1 Leon. 79. Lat. 248.

STAPLE *v.* HAYDEN.

S. C. Ante 216, 173.

[Trin. 2 Ann. B. R. 2 Ld. Raym. 922. S. C.]

6 Mod. 1, 2, 3. 3 Salk. 121. Holt 217. Repleader not allowed before trial. 1 Lev. 32. 2 Lev. 12, 142, 164. If denied were grantable, error. 6 Mod. 2, 102. Parties begin de novo at the first fault. 1 Mod. 2.

IT was laid down by the Court in the case of *Staple* and *Haydon*, *Trin.* 2 *Ann. B. R.*, which see, title *Default*, *p.* 216., first, That at common law a repleader was allowed before trial, because a verdict did not cure an immaterial issue: But now a repleader ought never to be allowed before trial, because the fault of the issue may be helped by the trial by the statute of jeofails.

2dly, That if a repleader be denied where it should be granted, or granted where it should be denied, it is error.

3dly, That the judgment of repleader is general, *viz. quod partes replacitent;* and the parties must begin again at

the first fault, which occasioned the immaterial issue: That if the declaration be ill, the bar ill, and the replication ill, the parties must begin *de novo;* but if the bar be good and the replication ill, at the replication. *Vide* 3 *Keb.* 664.

4thly, No costs are allowed on either side (*a*). No costs. Not after default.

5thly, That a repleader cannot be awarded after a default. 6 Mod. 2, 3. 1 Keb. 23, 39, 89, 90. 3 Lev. 20, 440. Dyer 117, 118. 2 Saund. 318, 319. 1 Salk. 173.

See the form of a Repleader. Lutw. 1622.

(*a*) *Vide* 1 *Bur.* 292.

REPLEVIN AND HOMINE REPLEGIANDO.

[580] Vide 1 Lev. 90. Raym. 33, 34, 255, &c. 6 Mod. 68, 81, 103, 158, 189.

[*Vide* title *Avowry.*]

1. HALET *v.* BURT.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 218. S. C. with other points.]

IN *trespass* for taking, *&c.* The defendant justified that the place *where* was a hundred, and time out of mind had a court of all actions, replevins, *&c.*, grantable in or out of court, and that a replevin was granted to him, by the bailiff out of court, *virtute, &c.* It was questioned, Whether a hundred-court could prescribe to hold plea of replevins, because the county-court could not hold plea of them at common law, but were enabled by the statute, which extends not to the hundred-court. But *per tot. Cur.* clearly, Supposing they may grant them in court, yet they cannot prescribe to grant them out of court.

Bailiff of a hundred cannot grant replevins out of court. 5 Mod. 252. S.C. S. C. Carth. 380. 1 Inst. 145. 2 Inst. 139. Co. Ent. 284. Dyer 245. F. N. B. 73. Skin. 674. 3 Salk. 272. Cases B. R. 120. Ante 394.

2. RICHARDS *v.* CORNFORTH.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 255. S. C. Comyns 42. S. C.]

Avowry for rent, where part is not yet due, is error; but might be cured before judgment, by abating the avowry as to that. Vide Cro. Jac. 473. S. C. 5 Mod. 363. called Ricards versus Cornforth. Moor 281. Hob. 133, 208. Cowp. 781. 5 T. R. 248.

ERROR of a judgment in replevin, wherein the defendant avowed for rent and had judgment; and now Mr. *Carthew* assigned for error, that part of the rent became due after the distress taken, for the distress was made the 26th day of *September*, 7 *W.* 3., which was three days before *Michaelmas:* whereas the defendant had avowed for that *Michaelmas* rent. *Et per Cur.* This is naught, for the judgment is to have a return irreplevisable, *i. e.* that he shall have the distress as a pledge till all the rent avowed for be paid, and that was more than was due at the time of the distress. In this case the avowant before judgment should have abated his avowry *quoad* the *Michaelmas* rent, and taken judgment for the rest; but the defendant getting his avowry mended in *C. B.*, the roll was amended here in *B. R.*, and so the error was cured.

[581]

3. MOOR *v.* WATTS.

[Mich. 12 Will. 3. B. R. 1 Ld. Raym. 613. S. C. *Vide* Skin. 61.]

Homine replegiando. See 2 Show. 218, 221 to 232. 6 Mod. 84. Lit. Rep. 54. 3 Leon. Cas. 323. Faresl. 9. S. C. Cases B. R. 423. Holt 626. Lilly Ent. 293.

UPON a *habeas corpus* it was returned, that *Watts* was in custody by virtue of a *capias* in *withernam;* and the case was, That upon a *homine replegiando* the sheriff returned an inquisition, finding that the party was eloigned, whereupon a *withernam* issued, returnable *octab. Martini*, which was not yet come; but the defendant was taken thereupon and moved to be bailed, and the matter was four times moved and debated. It was objected, that he could not be bailed upon the *withernam*, for it was an execution, and he had no day in court, and the plaintiff could not have a new *withernam:* And the Lord *Gray* coming into court upon an *elongata* found, was committed and lay by a fortnight: Also they cited *Raymond* 474., and said the return of the *elongata* was a kind of conviction, and the defendant thereby estopped from the pleading *non cepit.* That which seemed to be the sense of the Chief Justice, to which the rest agreed, was,

The sheriff cannot return they were not taken.

1st, That a *homine replegiando* does not differ from a common *replevin de averiis;* and that in a replevin for cattle, the sheriff must either return a *deliberari feci*, or an excuse thereof, *viz.* that no body came to shew him the cattle, or *elongata;* but he cannot return they were not

taken, for that goes to the point of the writ which the defendant is to falsify, and not the sheriff; that therefore the sheriff must return an *elongata* where he cannot make a deliverance, and the defendant is not concluded by the return of the *elongata* to plead *non cepit*, because it was necessary, and he could not avoid it: And as for this reason no action lies against the sheriff for a false return of an *elongata*, where he cannot make deliverance; so the defendant is not concluded to plead *non cepit* to the action, because he cannot falsify the return.

After elongata returned, and withernam awarded, the defendant may plead non cepit. See 2 Show. ut supra. Faresl. 17.

2dly, That the *capias* in *Withernam* does not alter the case, nor make it the stronger, because it is the mere consequence of the return of the *elongata*; therefore he is no more estopped by the *withernam* than he was by the *elongata* to plead *non cepit*, or to claim property if it were a common *replevin de averiis*.

3dly, That in *replevin de averiis* after an *elongata* and *withernam*, if the defendant pleads *non cepit*, he shall have his cattle again, and even a *capias* in *withernam* against the plaintiff for them; so it is if the defendant claims a property. Since the taking or property is in question, the law deems it reasonable that the defendant should have his goods again during the dispute. And by the same reason in a *homine replegiando*, *the defendant, upon pleading *non cepit*, should be restored to his liberty; and the Court denied the *withernam* to be an execution, for that cannot be before judgment, and held it only to be a mesne process: Also they disliked the case in *Raymond*, and the case of the lord *Gray*, but affirmed the case in the *Reg.* 79. *a.* and thought it made for them, and that upon *non cepit* pleaded, he might be bailed. *Keil.* 71. *a. F. N. B.* 74. were cited. Adding this farther reason, that hereby the supposal of the writ is denied and balanced, and the matter stands indifferent, according to the rule of bailing laid down by my lord *Coke*, upon *West.* 1 *c.* 15.

Upon pleading non cepit, or claiming property, the defendant shall have his goods again. So in homine replegiando he shall be bailed on non cepit.

Withernam is mesne process. Vide 2 Show. 218, &c. 6 Mod. 84. Farcsl. 17.

4thly, The Court held, that there might be a new *withernam*, but observed it was not necessary nor material to determine that in this case; for the bail must be in a sum certain, with condition that he appear *de die in diem*; and if judgment against him, that he render his body in *withernam ibidem remansurus quousq;* he render the party, and permit him to go at large; therefore if he be rendered again, he is in custody upon the *withernam*, as before. So if *H.* brings an *audita querela*, and is bailed, and judgment is against him, when *H.* is rendered back, he is in custody again upon the first execution; and so in an appeal of murder, if the defendant be bailed and makes default, process shall go against the bail, and also a *capias* against him; but if he render, he is in custody upon the

There may be a new withernam after the defendant has been bailed upon the first.

appeal. Yet *note;* Upon his default a new *capias* lies against him. So in this case, if before the *withernam* the defendant had pleaded *non cepit*, that had stopped the *withernam;* but if that had been found against him, the impediment was removed, and a *withernam* should have gone; so here, if after the *withernam* he plead *non cepit*, which is found against him, and he is not rendered, a *capias* in *withernam* lies against him, as well as process against his bail; for there is nothing to hinder it. *Vide* 8 *H.* 4. 2. *T. Mainprize* 23.

If on elongata returned the defendant pleads non cepit, no withernam shall issue. Vide 6 Mod. 84. Lit. Rep. 54. 3 Leon. Cas. 323.

The plaintiff's counsel seeing that by the opinion of the Court the defendant could not be bailed, unless he pleaded *non cepit*, would not deliver a declaration; which the Court said was putting a difficulty upon them; and upon this, in order to nonsuit the plaintiff, the question was, Whether the plaintiff was demandable upon the *withernam?* Also there was a former question, Whether he might be bailed upon the *habeas corpus* before the return of the *withernam?*

In homine replegiando, defendant cannot be bailed before the return of the withernam. See 2 Show. 218 to 232.

As to the last point the Court held, that before the return of the *withernam* the defendant could not be bailed; and so it is of an appeal of murder, the defendant ought not to be bailed before the return of the writ; and though this has been done in an appeal by some judges, yet *per Holt*, C. J. It was done *minus rite;* he would not therefore al- [583] low bail before the return of the *withernam*, and said, that in a *homine replegiando* after an *elongata* returned, if the defendant comes in *gratis*, and pleads *non cepit*, he shall not be put to final bail; (*ratio videtur esse*, because hereby the *withernam* is estopped or suspended;) but if he comes in custody upon a *capias* in *withernam*, he must give bail, and cannot be admitted to that till he call for a declaration, and plead *non cepit*.

Plaintiff is demandable on the return of the withernam, and may be nonsuited for not appearing.

As to the other point, the Chief Justice said, that whenever a writ is awarded, which is returnable, the return day is a day to both parties to appear, and though the writ be returned not served, the defendant may appear to prevent any ill consequence: As to prevent a *capias*, 5 *E.* 4. 69. So here to save himself on a *withernam*. *Respond.* 57. 7 *E.* 4. 5. Upon a *distringas proximas villas*, &c. the defendants have no day, yet they may appear and traverse. In a common replevin the original gives no day, for that is *vicontiel;* so is the *alias*, but the *pluries* is returnable here; and though there is no summons nor attachment in the writ, yet the day of the return is a day to the parties, and the entry is, that the defendant *attachiatus est ad respondend. de pl'ito quare cepit*, &c. And the reason is, because though in truth there was not actually an attachment, yet virtually, and in consequence of law it is so, he being bound to appear upon the peril of a *wither-*

nam. And though the plaintiff be absent, he may make an attorney. Hereupon he was called and nonsuited, for otherwise the defendant might lose his liberty for ever by such a contrivance.

4. HORN *v.* LEWIN.

[Hill. 12 Will. 3. B. R. 1 Ld. Raym. 639. S. C. Fortescue 233. S. C.]

IN *replevin* the defendant made conusance for 100 *l.* *de reddit̄u onerat. in aretro pro uno anno.* The plaintiff as to 50 *l.* pleads *de injuria sua propria absque hoc quod fuit in aretro*, and as to the other 50 *l.* that he was ready on the land till sun-set, and none came to receive it, and that he is still ready to pay it, and brings the money into court. Defendant demurs specially to the first plea, *quia attingit ad generalem exitum.* And as to the other 50 *l.* he takes it out of court, *& pro dampnis dicit quod non obtulit, &c.* and upon this the plaintiff demurred.

In a plea in bar of tender of rent in replevin, the money ought not to be brought into court. S. C. 3 Salk. 273, 344, 356. Cases B. R. 352. Vi. post 596, 597. Raym. 419. 1 Inst. 34 1 Vent. 222.

De injuria sua absq. hoc quod fuit in aretro; amounts to the general issue.

The case being several times spoken to, it was held,

1st, That *de injuria sua propria absq. hoc, &c.* was an impertinent and round-about way of pleading the general issue, and that it amounted to no more than the general issue, *riens in arrere*, and consequently was ill upon a special demurrer: Also this traverse put the defendant to an unnecessary replication; therefore as to the 50 *l.* it was clear for the defendant.

2dly, As to the other 50 *l.* The Court held, 1st, that the bare *paratus* was not sufficient, and did not amount to a tender without an *obtulit*, and therefore his being ready on the land, since he did not tender the rent, did not oblige the grantee to demand the rent before he made distress. *Hob.* 207. 1 *Ven.* 322. And so the distress was lawful without a demand, and then the avowry or conusance of the defendant stands unanswered. 2dly, the *profert* of the money was impertinent and idle. *Keil.* 20. *Dy.* 227. 2 *E.* 4. 25. *Pl.* 15. 2 *Cro.* 126. In debt upon a bond, there might be a *profert*, to save damages; because there the money is the thing in demand. But it cannot be in an avowry to a replevin, because the avowry is to justify the taking the cattle; and whether the money is paid or not, is not the question; but if the distress was rightfully taken, the avowant must have a return; if wrongfully, he must answer the plaintiff's damages. If then the *profert* was superfluous, so was the avowant's accepting it, and judgment must be given for the avowant on the avowry, by which it appears that rent was behind, and the distress lawful, and to which there is no sufficient answer. [584]

Vide 3 Lev. 104, 105. Raym. 419.

Vide H. Bl. 24.

5. PRATT *v.* RUTLITH.

[Trin. 13 Will. 3. B. R. *Vide* this case, title *Avowry*, pl. 6. page 95.]

OF *property claimed in replevin*, 6 *Mod.* 69, 81, 139, 140. 1 *Lev.* 90. *Lutw.* 1316.

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[585]
Vide 1 Lev. 68. 85, 289. 2 Lev. 198. 3 Lev. 363, 366. S. C. 6 Mod. 277, 259. 3 Salk. 309. Holt 68.

REQUEST.

FITZ-HUGH *v.* DENNINGTON.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1094. S. C.]

Condition to do an act at the end of seven years upon request; request must be made on the last day. See 1 Lev. 68, 85. Pal. 321. Faresl. 143, 144. Aleyn 25. Sty. 49, 74. Yelv. 66. 1 Cro. 179, 280. 2 Cro. 183, 652. 6 Mod. 200, 227, 260 1 Saund. 35. 1 Rol. Rep. 374. Moor 241. 1 Leon. 68, 69.

DEBT on a bond, with condition, reciting, that the plaintiff was apprentice to the defendant for seven years; *and that if the defendant at the end of seven years should procure him to be released from the joiners' company (if requested) then the bond to be void.* The defendant, pleaded, that at the end of seven years or afterwards *hucusq;* he was not requested. The Court held a request necessary, for the condition was to do a collateral thing; and as it is part of the condition it must be averred. And here a request within the seven years, when the thing was not to be done, shall not be intended *per Cur.* Afterwards this was moved again by *Broderick*, who urged that the defendant should have pleaded that he was not requested generally, and that the request might have been before the end of the seven years. *Et per Cur.* It is not to be done *post finem*, but *ad finem*, and the end of a thing is always part of that of which it is the end, and he was to be made free the last day of the seven years, and should have requested some convenient time in that day, that the other might have a reasonable time to do it in. Adjudged on a writ of error of a judgment in the Marshal's Court for the plaintiff, and the judgment reversed, *per totam Curiam.*

RESCUE.

See Cro. Car. 109. Cro. Jac. 345, 486. 2 Hawk. P. C. 139, &c.

1. DOMINUS REX v. BELT.

[Mich. 8 Will. 3. B. R.]

IN the case of a rescue there are two ways of proceeding: If the rescous is returned to the philazer, and process of outlawry issues, and the rescuer is brought into court, he shall not be discharged upon affidavits; but where upon the return of a rescue an attachment is granted, and the party examined upon interrogatories, upon answering them he shall be discharged.

Where the rescue shall be discharged upon affidavits. Vide pl. 3. infra.

2. ANONYMOUS.

See Ray. 161. 1 Lev. 214. 2 Lev. 26, 28. 3 Lev. 46.

[Trin. 12 Will. 3. B. R. 1 Ld. Raym. 589. S. C.]

THE sheriff returned *virtute brevis mihi direct. feci warrant. A. & B. ballivis meis qui virtute inde ceperunt* the defendant *& in custodia mea habuerunt quousq;* such and such *recusserunt* him *ex custodia ballivorum meorum;* And Mr. *Eyre* moved to quash it, and it was quashed *per Cur.* For *per Holt*, C. J. When the bailiffs have arrested the party, he is in fact and in truth in their custody; but in law, he is in the custody of the sheriff. An answer either way is good, *viz.* that he was rescued out of the bailiff's custody, or that he was rescued out of the sheriff's custody; but to say he was in the custody of the sheriff, and yet rescued out of the custody of the bailiffs, is repugnant.

Return that the bailiffs had him in custody of the the sheriff, and H. rescued him out of the custody of the bailiffs, ill for repugnancy. Vide ante 436, 432. Post 589. 1 Show. 180. Lutw. 130. 6 Mod. 211. 3 Mod. 114, 115.

3. ANONYMOUS.

[Hill. 3 Ann. B. R.]

UPON an affidavit of a rescue, an attachment was prayed against the rescuers, and this was a rescue upon mesne process; but denied; for *per Holt*, C. J. The rescue must be returned upon the writ, and the motion and attachment founded upon that; but it is never the course to grant it upon affidavits.

Attachment for a rescue never granted upon affidavits. Vide Str. 531. Fine for a rescue.

Sir *Samuel Astry* said, it was the constant course upon the return of a rescue, to set four nobles fine upon each

Vide Raym. 85. 3 Lev. 312.

offender, and that he had it from Mr. J. *Twisden*. *Hill.* 11 *Will.* 3. *B. R.* *Vide* 2 *Jo.* 198. (*a*)

See 6 Mod. 141. *a difference where it is on mesne process, and where on an execution.*

(*a*) In *Rex* v. *Elkins*, 4 *Bur.* 2129., Lord *Mansfield* said, that this seemed to be a strange rule; it puts all rescues, in all cases, and under all circumstances, upon the same foot. The Court in that case fined the defendant 5 *l.* In *Rex* v. *Alway et al.*, marg. *ibid.* the Court set a fine of only 6 *s.* 8 *d.* each.

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[587]

RESTITUTION.

1. REX & REGINA *v.* LEAVER.

[Trin. 3 W. & M. B. R.]

Writ of restitution lies not against any that are not parties to the record. Raym. 85. S. C. 2 Lev. 223. 3 Keb. 231. 1 Show. 261. Comb. 47, 58. Skin. 32. Tem. 320.

IN an indictment of barretry, the defendant was convict and fined 100 *l.* which was levied by the sheriff, and paid into the hands of the collectors; afterwards the judgment was reversed. *Pemberton* moved for a rule for restitution against the collectors. *Holt*, C. J. It cannot be, for they are not party to any record here. You ought to sue out a special *sci. fa.* and make them parties, as in 1 *Cro.* 328., but this he also doubted, saying this case differed. He put this case: A recoverer in ejectment is disseised, or makes a feoffment; afterwards the judgment is reversed: Will a writ of restitution lie? He said it would not, because the disseisor or feoffee are strangers to the record, which *Pemberton* agreed. If a feme recover damages and then marries, and the judgment is reversed, restitution lies against her and her husband; but they are parties. And the motion was denied.

Vide 5 Mod. 443, 444.

2. DOMINUS REX *v.* TOSLIN & AL.

[Hill. 10 Will. 3. B. R.]

Restitution denied upon quashing inquisition of forcible entry, lease for years

A MOTION was made for restitution, upon quashing an inquisition of forcible entry; the case was, that the lessor arrested the lessee for rent, and while he was in custody entered the house under pretence of forfeiture by a proviso in the lease; but the motion was denied, be-

cause here appears a title standing out; which he shall not void by sinister means, but ought to pursue his remedy by ejectment according to law. Otherwise, had no title appeared.

Cro. El. 466. 1 Leon. Cas. 461. Vide Dalton, c. 132. 1 Hawk. c. 64. s. 47.

3. DOMINA REGINA v. WINTER.

[Pasch. 4 Ann. B. R.]

Traverse to inquisition of forcible entry is a supersedeas to restitution. S. C. Holt 324. Vide 1 Hawk. c. 64. s. 60, 62.

UPON a motion made by Mr. *Broderick* for a *procedendo* in a case of an inquisition taken by justices of peace, and a forcible detainer found, and a warrant granted by them to restore the possession, which was suspended by a *certiorari* * issued out of this court, it was said by *Holt*, C. J. That if the party against whom the inquistion was found could traverse the force, that was always a reason [* 588] to stay restitution; nay, that it had been held a *supersedeas* to the awarding restitution, and that it was so in Sir *Richard Bray's* case: There an inquisition found a forcible entry: The defendant offered immediately before the justice to traverse the force, the justice refused the traverse and granted restitution; and *Kelynge*, C. J. granted re-restitution. He said also, that all inquisitions of office are of common right traversable; so is a *distringas proximus villatas*, in case of pulling down hedges in the night, on the statute of *West.* 2. though the statute mentions no such thing. And if in case of an inquisition of forcible entry taken before a justice of peace, the defendant tenders his traverse immediately, the justice must adjourn to another day, and award process to return a jury. *Powel*, J. said, that in the case in *Dyer* 122. a traverse of the indictment was held to be a *supersedeas* only at election, but latterly it had been held an absolute *supersedeas:* And he said also, that if *H.* license another to enter into his land and take the profits, it is a lease at will; and if the license was for a year, it is a lease for a year; otherwise of a license to hunt. And if *H.* license another to come upon his dock (which was the principal case), and carry on his trade, it is a lease; because it is all the proper profits of a dock. Note; *Trin.* 11 *W.* 3. *Rex* versus *Scarlet*, the same question was, *viz.* Whether re-restitution should be granted, because the justice had refused to traverse to an inquisition of forcible entry? But not resolved. 1 *Sid.* 287. 2 *Keb.* 571. *Dy.* 122. *Sty.* 359, 360. were cited.

Rep. Temp. Hard. 175. Str. 474.

Vide Cro. Jac. 246, 698. Cro. Car. 328.

4. ANONYMOUS.

[Pasch. 4 Ann. B. R.]

Where the money recovered in a judgment appears by record to be paid, restitution shall be without a scire facias; otherwise where levied only.

WHERE the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party shall have restitution without a *scire facias*, and there is a certainty of what was lost; otherwise where it was levied but not paid; there must then be a *scire facias*, suggesting the matter of fact, *viz.* the sum levied, *&c.* But where judgment is set aside after execution for irregularity, there needs no *scire facias* for restitution, but an attachment shall be granted upon the rule for contempt, if there be not a restitution. *Per Holt*, C. J.

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[589]

Vide 4 Leon. Cas. 69, 145, 223. Cro. El. 310. Cro. Car. 189. Post 699.

RETORN OF WRITS.

[*Vide* title *Writs.*]

1. WILSON *v.* LAW.

[Mich. 6 W. & M. B. R. 1 Ld. Raym. 20. S. C.]

Attach. feci good in a return. Vide Cro. El. 13. pl. 7. 4 Mod. 287. 2 Rol. 459.

WILSON brought an appeal of murder against *John Law* for killing his brother *Robert Wilson*, and declared against him. The defendant prayed *oyer* of the writ and return; and having *oyer*, demurred to the writ and return, and to the felony pleaded over, not guilty. Exception was taken, 1st, That the writ commanded the sheriff *quod attach. Johannem Law*, *&c.*, and the sheriff had returned *attachiari feci*. This they pretended was no answer to the writ, the injunction whereof is personal; but the Court held it well enough, for the sheriff was not bound to execute it in person, but might do it by his bailiffs. *Dyer* 241. 2 *Ro.* 457. And what the bailiffs do by the sheriff's warrant, is done by the sheriff, *nam qui facit per alium, facit per se.* If he had returned *attachiatus est*, it had been good. *Captus est* is a good return to a *capias*, *Kitch.* 258.; for if there is the substance, it is no matter for form, as 1 *H.* 6. 6. a *scire facias* was returned, *scire faci A. B.*, without adding *infra nominat.*; yet, be-

cause it was said to be *virtute brevis prædict. prout mihi præcipitur*, it was adjudged good.

2dly, The sheriff returned, *ita quod corpus ejus paratum habeo ubicunq;* and it was objected this was nonsense, and also impossible. *Sed per Cur.* The return is good without it; it is therefore but surplusage, which will not vitiate a writ or indictment, much less a return, which requires not such preciseness in form. 3 *Cro.* 893. 2 *Ro.* 460.

Surplusage in return rejected. Vide ante 430, 432, 436, 586.

See more of this case, title *Appeal, pl.* 2. *pag.* 59.

2. PALMET *v.* PRICE.

[Mich. 7 Will. 3. B. R.]

AN action was laid in *Staffordshire*, and judgment for the plaintiff; he sued out a *fieri facias* with a *testatum* into *Worcestershire;* and now it was moved that this was irregular, and ought to be set aside, because no *fieri facias* had ever gone into * *Staffordshire;* and the sheriff of *Staffordshire* made affidavit that he never returned any *fieri facias* in the cause: *Sed non allocatur;* for the *fieri facias* upon which the testatum is founded, is returned of course by the attornies themselves, as originals are; if you search the file you may find one, and that is sufficient.

Process whereon to ground testatum is returned by the attorney of course. Ante 515. 1 Barnes 138. 2 Barn. 169.

[* 590]

3 T. R. 658.

REVERSION.

Vide ante Remainder, page 576. 1 Saund. 260, 261. 1 Salk. 231. 3 Lev. 94, 209, 233, 406.

ABBOT *v.* BURTON.

[Trin. 7 Ann. C. B. Comyns 160. S. C.]

J. S. being seised in fee of certain lands descended to him *a parte materna*, covenants to levy a fine thereof to *A.* and *B.* to the use of them and their heirs, to the intent that a common recovery should be suffered against the said conusees to the use of *J. S.* for life, remainder to his wife for life, remainder to his first, second, and third sons in tail, *&c.*, remainder to the right heirs of *J. S.* The fine is accordingly levied, and then the common recovery is suffered against the conusees of the fine, as tenants to the *præcipe* with voucher of *J. S.* Afterwards *J. S.* and his wife die without issue, and the lessor of the plaintiff

H. seised of lands a parte materna, limits several estates with remainder to the use of his right heirs. The heir a parte materna shall have it, being the ancient use. 2 Mod. 286. 1 Co. 105. Cro. Car. 161. 2 Lev. 60, 79. Cro. Eliz. 727, 840, 792. S. C.

Rep. A. Q. 181. Show. 92. 1 Inst. 73.

is heir of *J. S. a parte materna*, and the defendant heir-general. This matter being found upon a special verdict in ejectment, the question was, Whether this limitation of the remainder to the use of the right heirs of *J. S.* did create a new estate descendible to the heirs-general, or was only the ancient use? And the resolution of the Court delivered by *Trevor*, C. J. was for the plaintiff, that it was the ancient use, and that there was no difference when upon the conveyance of an estate any part of the use results by implication of law, and when it is referred by express declaration to the party from whom the estate moved; for there is no reason that a greater alteration should be wrought in a use which a man by express and plain words reserves to himself upon a conveyance of his estate, than when the law makes a construction of this intent to reserve it, not from express words, but from other circumstances and presumptions, which in the consideration of law do as strongly and manifestly declare his mind: And for this was cited the case of *Godbolt* and *Freestone*, 3 *Lev.* 406.

No difference between express and implied use. Post 675, 676.

[591]

But the difference whereby that case was endeavoured to be distinguished from the case in question was this: That was upon a feoffment to the use of the feoffor for life, remainder to his first, second, and other sons in tail, remainder to the right heirs of the feoffor; and adjudged, that this remainder was to the heirs of the feoffor *a parte materna*, according to the ancient estate and use which the feoffor had before the feoffment: And the reason was, because this remainder of the use did arise out of the estates which immediately moved from the feoffor, and was no more than what the law would have reserved, if no use at all had been declared of the remainder. But in the present case, the use limited in remainder to the right heirs of *J. S.* does not arise out of an estate that moved immediately by that conveyance from *J. S.*, but out of the estate of the conusees, who were seised in fee both of the estate and use by the fine, and did by the common recovery convey over that estate, out of which all the new uses and the remainder in question arose. To this the Chief Justice said, that the fine and common recovery were both to be taken as one entire conveyance (*a*), consisting of these several parts, and directed as to the use of them by the same covenants. That though the conusees had a seisin in fee of the estate and use vested in them by the fine for a special purpose, and upon that seisin the common recovery was had, and in strictness the estate passed by it was her estate; yet upon consideration of the whole conveyance the estate did originally move from *J. S.* who was the co-

Vide ante 567, 570.

(*a*) *Vide Cro. Jac.* 643. 2 *Burr.* 1134. 4 *Burr.* 1952.

nusor of the fine; and for that reason, if there had been no limitation at all of this remainder of the use upon this recovery, he took it to be very clear, that so much as remained unlimited should result to the conusor and his heirs, and not to the conusee, in whom the estate was not vested with a purpose to create him any interest, but in order to forward and complete the conveyance of the conusor's estate, which was taken as one conveyance; then does the use limited upon the common recovery as properly arise out of the estate that moved from the conusor of the fine, as if he had made a feoffment or fine, or any single conveyance to that use. Judgment for the plaintiff (*a*).

Note: Estates-tail cannot be barred where the reversion is in the Crown. Raym. 358.

(*a*) *Vide Doe ex dem. Crow* v. *Baldwere,* 5 *T. R.* 104. Note to *Price* v. *Langford, ante* 337.

REVOCATION.

[592]

See 1 Lev. 86. 2 Lev. 149. Cro. Jac. 497. 3 Lev. 213. 1 Show. 89.

1. * HITCHINS *v.* BASSET.

[Trin. 5 W. & M. B. R.]

Special verdict finding a will of lands, and that afterwards the testator made aliud testament. imports not a revocation. 1 Co. 112, and 174. 10 Co. 86. 2 Lev. 149. S. C. 2 D. 528. p. 7. 3 Mod. 203. 1 Show. 537. Comb. 90, 202.

IN *ejectment*, the jury found a special verdict: That Sir *H. Killigrew* being seised in fee, made his will, and devised his lands to *B.* for life, remainder to *C.* in fee; they find likewise that Sir *H. Killigrew* made *aliud testamentum* in writing; but what were the contents of that will they do not know: The question was, if the first will was revoked? *Finch* argued, that every later will is not a revocation, for a man by one will may dispose of one acre, and by another will of another acre: So if a man purchase lands after he has made his will, he need not make his will over again, but make another will as to these. *Vide Cro. Car.* 293. Therefore this other will might be of other lands, and no revocation, and the *aliud testamentum* might be no revocation, but might be consistent. *Cro. Eliz.* 721. *Cro. Car.* 24. *Levinz contra* argued, that revocations are favoured, because they are in the nature of restitution to the heir, and all restitutions are favoured. *Vide Dyer* 310. *Moor* 429. 1 *Roll.* 614. A deed of feoffment without livery, a bargain and sale without inrolment, a grant

of a reversion without attornment will revoke a will, and yet these are void acts; but the reason is, that it appears now it was not the testator's intent that it should remain his will, the first will must be supposed to be perfect and include all; and if a man claims by devise, he must in pleading say, that the testator by his last will devised, &c. 44 *Ass.* 36. 2 *Ric.* 2. 3. *b.* But the Court were of opinion, that it was no revocation, and the *aliud testamentum* might concern other lands, or no lands at all, or be a confirmation of the former: And the judgment was afterwards affirmed in the House of Lords. *Vide Hard.* 374. *Parl. Cases* 146. (*a*)

(*a*) In the case of *Goodright ex dem. Rolfe* v. *Harwood*, 3 *Wils.* 497. *it was found* by special verdict, that the testator made and duly published *another* will, the disposition whereof was *different* from the disposition in the former, but in what particulars was unknown. The Court of *C. B.* held, that the first will was revoked; but the judgment was reversed in *B. R. Cowp.* 86., and the judgment of reversal affirmed in the House of Lords, 7 *Bro. P. C.* 344. Mr. *Powell* observes, that if the jury find *expressly*, that the disposition made by the second will is *inconsistent* with the devises contained in the former, that appears to be a sufficient ground to decide the latter a revocation, *Essay on Devises*, 541. Wherever there is an alteration in the legal or equitable estate of the devisor, a will is revoked, *Burgoigne* v. *Fox*, 1 *Atk.* 576. *Bennett* v. *Wade*, 2 *Atk.* 325. *Darley* v. *Darley*, 3 *Wils.* 6. 7 *Bro. P. C.* 177. Ld. *Lincoln*'s Case, *Sho. P. C.* 154. *Eq. Ab.* 411. 2 *Freem.* 202. *Pollen* v. *Huband*, *Eq. Ab.* 412. *Sparrow* v. *Hardcastle*, 3 *Atk.* 799. *Amb.* 224. *Dister* v. *Dister*, 3 *Lev.* 108. *Marwood* v. *Turner*, 3 *Wms.* 163. *Lutwich* v. *Mytton*, 1 *Rol. Ab.* 614. *Hick* v. *Mors*, *Amb.*215. *Vide Parsons* v. *Freeman*, 3 *Atk.* 741. *Rider* v. *Wager*, 2 *P. Wms.* 329. *Cotter* v. *Layer*, *id.*624. Where a will is made between the making a tenant to the *præcipe* and suffering a recovery thereon, or between the surrender and admittance to a copyhold, it is good, as the subsequent acts relate to the prior, *Selwin* v. *Selwin*, 2 *Bur.* 1131. 1 *Bl. Rep.* 251. *Roe ex dem. Roden* v. *Griffiths*, 4 *Bur.*1952. 1 *Bl.* 605. A conveyance of the legal estate from one trustee, &c. to another, is not a revocation, *Doe ex dem. Gibbons* v. *Potts*, *Doug.* 710. Nor in equity, a conveyance of the legal estate to the devisor having a prior equitable interest, *Watts* v. *Fullarton*, cited *ibid.* *Willett* v. *Sandford*, 1 *Vez.* 178, 186. A mortgage in equity is only held a revocation *pro tanto*, *Rider* v. *Wager*, 2 *Wms.* 616. *Vide Powell* 566. for other cases relative to this subject. In *Swift ex dem. Neale* v. *Roberts*, 3 *Bur.* 1491. Lord *Mansfield* said, constructive revocations, contrary to the intention of the testator, ought not to be indulged, and some overstrained resolutions of that sort had brought a scandal upon the law. In *Roe ex dem. Noden* v. *Griffiths*, 4 *Bur.* 1960. he expressed an opinion nearly similar; and in *Doe* v. *Pott*, *Doug.* 721. he said, all revocations which are not agreeable to the intention of the testator, are founded upon artificial and absurd reasoning. The absurdity of Lord *Lincoln*'s case is shocking; however, it is now law.

In *Eccleston* v. *Spoke*, *Carth.* 79. *Comb.* 156. 1 *Sho.* 89. *Holt* 222. it was held, a will duly executed was not revoked by another instrument, purporting to be a will in favour of the same person, but not attested by the witnesses in the presence of the testator, but published by the testator in the presence of the witnesses, which is sufficient in case of a bare revocation. And in *Onions* v. *Tyrer*, 1 *P. Wms.* 343. *Prec. Ch.* 459.

2 *Vern.* 741. *Gilb. Rep. Eq.* 130. where, in addition to the circumstances last mentioned, the first will was cancelled by order of the testator, it was held not to be revoked; the cancelling being upon a presumption that the later will was good and duly executed. In *Godright ex dem. Glazier* v. *Glazier*, 4. *Bur.* 2512. it was ruled that a first will, remaining in the testator's possession uncancelled, was not revoked by a second, which was cancelled by the testator. In *Burtonshaw* v. *Gilbert*, *Cowp.* 49. where the testator executed a will, and a duplicate which he deposited in the hands of another person, and afterwards made another will, the second will, and that part of the first which he retained in his own possession, were at his death together cancelled, and the part which he deposited with the third person, had, at his request, been returned, and was in his possession uncancelled; the first will ruled to be revoked: The Court agreed that cancelling was an equivocal act, and in order to make it a revocation it must be proved *quo animo* it was done. *Vide Bibb ex dem. Mole* v. *Thomas*, 2 *Bl. Rep.* 1043.

2. LUGG *v.* LUGG.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 441. S. C.]

BEFORE a Commission of Delegates. One being single, made his will, and devised all his personal estate to *J. S.* afterwards he married and had several children, and died without other will or disposition, and now *coram Delegatis*, of which * *Treby*, C. J. was one, it was ruled, that there being such an alteration in his estate, and circumstances so different at the time of his death from what they were when he made the will, here was room and presumptive evidence to believe a revocation, and that the testator continued not of the same mind (*a*).

Will of personal estate presumed to be revoked by alteration of circumstances. Vide 1 Salk. 257. S. C. Cases B. R. 236. Vide 2 Sho. 242.

[* 593]

For Revocation of Uses, &c. Vide 1 Co. 112, 173, 174. 6 Co. 33, 34. 10 Co. 36, 143. Cro. Car. 472. Chan. Cas. 242. 2 Lev. 149.

(*a*) The rule in this case has been confirmed by many subsequent decisions, and the courts of common law having adopted the principle from those of civil law, the cases decided in either of those courts are reciprocally considered as authority in the others.

The doctrine of revocation of a will by the alteration of circumstances, is established to extend to devises of lands by *Brown* v. *Thompson*, 1 *Eq. Ca. Ab.* 413. *Christopher* v. *Christopher*, 4 *Bur.* 2171. *n.* 2182. *Sprang* v. *Stone*, *Ambl.* 721. *Doe ex dem. Lancashire* v. *Lancashire*, 5 *T. R.* 49. In the last case the rule was extended to the birth of a posthumous child, and the Court were of opinion that the principle is not so much an intention to alter the will, arising from the circumstances happening afterwards, as a tacit condition annexed to the will itself, at the time of making it, that the party does not then intend that it should take effect, if there should be a total change in the situation of his family.

The marriage and birth of a child, must be both subsequent to the making the will, in order to produce a revocation, *Shepherd* v. *Shepherd*, 5 *T. R.* 51. *n.* *Ward* v. *Philips*, cited *ibid.* *Getson* v. *Wells*, cited *Ambler* 490. *Vide Wellington* v. *Wellington*, 4 *Bur.* 2165. *Jackson* v. *Hurlock*, *Amb.* 487.

In *Thompson* and *Shepherd*, *Ambler* 490, in marg. marriage and having children were held not a revocation of a will made by a widower who

by a former wife had children, living at the time he made his will.

In *Gray* v. *Altham*, cited in *Jackson* v. *Hurlock*, *Ambler* 490. it was held that the presumption of revocation was repelled by the testator having made a provision for his children by settlement before marriage. In *Jackson* v. *Hurlock*, Lord *Nottingham* was of the same opinion.

Vide Brady, lessee of *Norris*, v. *Cubitt*, *Doug*. 31. In that case a person devised part of his property to certain uses. He afterwards made a settlement, limiting other lands, of the annual value of 1230*l*. (subject to a jointure on his intended wife) to himself in fee; and then married and had a child, subsequent to whose birth he referred to the will as a subsisting instrument; and it was ruled not to be revoked.

The following note, relative to this subject, was taken by the Editor:

"6th *May* 1793.

"In the PREROGATIVE COURT.

"*Wright* against *Netherwood*.

[☞ *A*. makes a will, leaving some legacies, and appointing his wife residuary legatee; she died, leaving several children. He married again, and had one child by his second wife. Afterwards *A*. with his wife and all his children perished by shipwreck. The will is not revoked.]

"This case arose on a question, Whether the will of *George Netherwood*, deceased, was or was not revoked?

"On the 24th *June* 1783, the deceased married *Elizabeth Lomax*, spinster. On the 8th of *October* following he made his will, whereby he charged his real estate with the payment of debts and legacies, if his personal should be deficient. He gave some pecuniary and specific legacies, and bequeathed *the residue* of his *personal* estate to *his wife* by her maiden name *Elizabeth Lomax*, and devised the real estate to her for life, remainder to one *Joseph Netherwood*; he appointed *Wright*, the party, executor of his effects in *England*, and another executor for his effects in the *West Indies*.

"Afterwards *Elizabeth* died, leaving several children by her husband. The testator married the sister of his former wife, and had issue by her one son.

"The said *George Netherwood* embarked for *England* from *Jamaica* with his wife, her son, and all the children by the former marriage. The ship in which they embarked was never afterwards heard of, and was admitted to be lost.

"The will was proved by the executor in *England*, in common form, and he was afterwards cited by the next of kin of the deceased to prove it in solemn form, or to shew cause why it should not be declared invalid.

"The facts were admitted on both sides to be as above stated.

"By the inventory the property of the deceased appeared to amount to about 8000*l*. The legacies amounted to rather more than 200*l*.

"Sir *William Scott* and Dr. *Nicholl* in support of the will.—The will in this case was not revoked by the second marriage and the birth of a child; for although it may be admitted as a general principle, that these circumstances do revoke a will, on the presumption that upon such a total alteration of circumstances the testator did not continue to have the same intentions; that presumption is liable to be repelled by circumstances. If it appears to be his intention that the will should stand, marriage and the birth of a child will not destroy it.

"All presumptive revocations are *stricti juris*, and must be wholly inconsistent with the deceased's intention to dispose of his property according to the will.

"The general principle of these revocations is, that when a person has contracted such new obligations and relations, it cannot be supposed that he meant to adhere to his former disposition. That principle is recognized by all the cases upon the subject, and they all proceed upon the ground of a *total alteration* in the testator's circumstances; but if there is not a total alteration, the implication is repelled.

"No case can be stronger against a revocation than this. When he was

married he made a will, by which he bequeathed some small legacies, and disposed of the rest of his property to his wife. This might be in confidence that she would take care of any children he should have by her. The wife dies, and the residue becomes lapsed. He marries again, and his fortune will take the same course in point of substance as if he had made no will. The few legacies will belong to the persons to whom they were given, and the residue would be subject to the statute of distribution.

"There are cases in which it has been held, that this alteration of circumstances did not amount to a revocation; where the alteration was not such as to make the Court say, the testator could not in duty adhere to his will. Such was the case of *Brown* and *Thompson*, 1 *Eq. Ca. Ab.* 413., where it was held that the alteration of circumstances was not sufficient to amount to a revocation; for no injury was done any person, and those whom the testator was bound to provide for were taken care of (1); which case is in substance the same as this; the great bulk would go to the wife and children; all the new relations are fully satisfied; and there is no probability of the testator's not intending to adhere to his former disposition. In *Brady* v. *Cubitt, Doug.* 31—38., it is said by Lord *Mansfield*, "that upon his recollection there was no case in which marriage and the birth of a child have been held to raise an implied revocation, where there has not been a disposition of the whole estate." And although that may not be essential, it is certainly very material. Presumed revocations may exist where the residue is very small, but it is otherwise where a small part only is disposed of, and the bulk remains. In *Thompson* and *Shepherd*, mentioned in a note to *Amb.* 490., it was held that marriage and having children did not amount to a revocation of a will made by a widower who had children. It was not that complete alteration of circumstances which implies the revocation of a declared intention. A case of *Calder* and *Calder*, lately decided in the Prerogative Court, does not apply. It depended on its own circumstances; and there was no power to presume that the testator adhered to his intention. That was the case of a will made by a widower having no children; he had no view to the relations of husband and father. The great bulk of his property was left away, and there were declarations shewing his idea that his property would go to his wife and children upon a marriage subsequent to the will; and the will itself was such as would involve the family in endless litigation. Every circumstance in that case raised the implication, that the will should be revoked. No such circumstances exist in this case; but, on the contrary, every circumstance repels the implication.

"There would be a very considerable provision for the wife and her child; and it must be presumed that he knew the operation of the will; that it disposed of the small legacies according to his intention; that the residue would be distributable according to law; and that his property would be managed by the respective persons in whom he had reposed a confidence for the purpose.

"The advocates for the plaintiff having here closed their arguments, the judge intimated a wish, that the case might be considered upon another point, *viz.* Whether the will (provided it was revoked) did not revive, as the son by the second wife did not survive his father? For which purpose it stood over till the 13th of *May*; when the advocates before-mentioned argued on that point. In cases where it cannot be actually ascertained whether the parent or the son survived, and they perished by the same stroke of death, according to the *Roman* law, it was presumed that if the son had not attained the age of puberty, the father survived; but if the son had attained that age, he had survived the father. This presumption arises from

(1) *Vide* the observations of *Buller*, J. upon this opinion, in *Doe* v. *Lancashire*.

the degree of strength supposed to belong to the respective parties. It was liable to certain exceptions in behalf of claims favoured by that law for the interest of mothers, and in cases of fiduciary bequests, and the right of patronage. The general rule of presumption being applied to the present case, the child by the second wife being only about a year old, must be taken to have died before his father. The question then arises, Whether the will, if it was before revoked, was revived by the circumstance of the father surviving?

"By the *Roman* law, a will which was revoked by the birth of a posthumous child, did not revive by his death, because no change in the father's intention can in that case be presumed; but it was held otherwise with respect to the *quasi posthumi*, or those who were born after the will was made in the testator's lifetime. On their death the will was restored by the Prætorian law, as upon a new designation of intention.

"There is no case where it has been held by the law of *England*, that, under these circumstances, a presumptive revocation does take place. There are two points of time to be regarded in considering the effect of the will: 1st, The paction: 2d, The consummation. The will was undoubtedly good when it was made. Was it otherwise at the death of the testator? The presumption of the law of *England*, with respect to revocations, is not more strong than the *agnatio sui hæredis* by the civil law, nor so strong, for that was an actual revocation, and the other is only a presumption liable to be repelled. The removal of the cause will as strongly imply a renewal of the first intention, or rather more strongly, on account of the omission to destroy the will; but by the Prætorian civil law it was held, that, upon the death of the *agnatus*, the will was restored. It is presumed, that the reason why the testator did not revoke the will, was, that he was prevented by death; but, if the child dies first, the presumption is, that, not having revoked the will, he intended it to stand. At all events, the testator intended the legacies, on account of which alone this dispute is material, should be carried into effect, and that the executors whom he appointed should have the management of his property: And if the Court, on a presumed intent, decides against the will, the actual intention of the testator will be defeated.

"Dr. *Batten* and Dr. *Swabey contra*. Though it may be admitted that the will was originally good, it is a general rule that a will is revoked by marriage and the birth of a child.

"In the present case there was a total change in the testator's situation, from being a widower to becoming again a husband and a father;—such a total change as to raise the presumption that he did not intend the will to stand. It had been decided by Sir *Geo. Hay*, that the cases of a widower and a bachelor are the same. There is no decision that the quantum of the property will vary the presumption. It appears that the case of *Brown* and *Thompson* came on first before Sir *John Trevor*, Master of the Rolls, who held, that the will was revoked; and afterwards before Lord Keeper *Wright*, who was of a different opinion on account of the particular circumstances of the case; and *Buller*, J. in *Doe ex dem. Lancashire* v. *Lancashire*, 5 *T. R.* 49, 61., thought the opinion of the Master of the Rolls better than that of the Lord Keeper.

"There are some *dicta* of Lord *Mansfield*, but they are only *dicta*, in *Brady* and *Cubitt*, that the will is not revoked by marriage and the birth of a child, if it only covers part of the property. In *Doe* v. *Lancashire*, the revocation is held to arise from a tacit condition at the time of making the will. There may be some cases in which the will is allowed to stand, from circumstances repelling the presumption; but nothing is more dangerous than to let a particular equity, arising from the quantity of the effects, operate against a general rule of law. It would introduce a vague and uncertain method of decision, and it is better to adhere to a known presumption of law. The disposition was complete by the

will, both as to the real and personal estate; and the testator has not shewn, since the alteration in his circumstances, any intention to adhere to it. Though the real estate is not within the jurisdiction of this Court, it may afford an argument in favour of the revocation that it was wholly devised away.

"As to the other point.—It is not to be taken for granted in this case, even according to the principles of the *Roman* law, that the child died first. The doctrine alluded to goes no further than to shew, that when the father and son perish by the same blow of death, the father is supposed to survive his infant son. But it does not appear that in this case they did perish by the same blow of death. The ship being cast away is all that is admitted; *non constat* that they *died* by shipwreck. The general law is, that the will was revoked: To take the case out of that law, its revival by the father's surviving must be shewn on the other side. There are passages in Dr. *Zouch* which, shew, that in testamentary cases the presumption of father or son surviving is not adopted.

"By the *Roman* law, if a will was void for the prætermission of a child who afterwards died, the will was not thereby rendered valid; or, if it was revoked by the birth of a posthumous child, the death of that child did not restore it; and in case of a will becoming void by any subsequent cause, the removal of that cause did not restore it by the civil law, though it was otherwise by the Prætorian law, which was in the nature of a court of equity, and only prevailed for the sake of the *hæres scriptus*, or residuary legatee. In this case, the residuary legatee was dead, and the ground on which the *jus prætorium* interposed fails. Any particular legatees only had the advantage of its revival incidentally, as it was allowed to stand on account of the general *hæres scriptus*.

"Suppose this case was to be decided by the *Roman* law, and the will were to be restored by survivorship, it could not be restored in the present instance, for no alteration in the father's intention can be presumed to have taken place after the son's death: and it was only upon such presumption that, after an *agnatio sui hæredis* the will was by the Prætorian law restored. If the father did survive a few minutes, there is no room to suppose that he had time to change his intention. But the doctrine of revival is no part of the civil law which has been adopted by the law of *England*. There is a case of *Barrow* and *Baxter* decided in this court; it is mentioned in *Ambler* 491. From the register it appears, that the wife brought no fortune and had a settlement; there was a child who died before the testator, and yet the will was held to be revoked. As a matter of general learning, the *Roman* law is not adopted in these cases by the law of *England*, for they essentially differ from each other in many respects.

"Sir *Wm. Scott* and Dr. *Nicholl* in reply.—The civil law, upon the grounds which have been already urged, is clearly in favour of the will; and the Court will not attend to distinctions between *jus prætorium* and *jus civile*. *Jus prætorium* was as much a part of the general system as any other, and in fact it was the predominating and over-ruling authority.

"The case of *Barrow* and *Baxter* is certainly contrary to the civil law; and it does not appear if those points were adduced, which in this cause have been urged in support of the will.

"With regard to the distinction which has been made between the *hæres scriptus* and a special legatee, the latter was as much intended to be benefited as the former.

"It being the established law that the death of a *quasi posthumus* revives the will, the distance of the interval between his death and that of the testator is not material against the presumption of law. The Court is not to examine by evidence whether there was an actual change of intention or not.

"The law, with respect to revocations by marriage and the birth of a child, is, as laid down in *Brady* and *Cubitt*, a mere principle of presumption; and, in that case, all the circumstances must be taken together, and

the state of the property may be very material. It is extraordinary, if there is any decision that a paper disposing of small legacies will be revoked by subsequent marriage, *&c.*, that no such case appears. The courts have not gone the length of Lord *Mansfield* in *Brady* and *Cubitt*, by deciding that a revocation does not take place if any property is left: But there is no case where marriage and the birth of a child have been held to amount to a revocation, if the will was such as might have been made after these relations were contracted, fairly and without injury to the family.

"The disposition in the will in question only extends to a very small part of the property, and might be fairly made by a person having a family, the lapsed residuary bequest being as if it had never existed.

"The testator having no wife or children at his death, the tacit condition (which in *Doe* and *Lancashire* is considered as the principle of these cases) may be fairly considered as a condition that the will should not take effect if the testator should afterwards have a wife and children *who survived* him.

"All these cases in the courts of common law admit, that the doctrine upon this subject is borrowed from the civil law. The Courts have not adopted all the minute rules and distinctions, but only some of the general principles; and there is no principle better founded on justice, than that if a will is revoked by the birth of a child, it is revived by his death in the life of the father.

"Judgment of the Court.

"Sir *Wm. Wynne.*—It is contended on the part of the next of kin, that by marriage and the birth of a child the will became void by implication of law: On the other side it is contended, that the particular circumstances of the case rebut that implication.

"It is clearly the general law, that a will made by a bachelor is revoked by subsequent marriage and the birth of a child. That there is a distinction in the case mentioned by *Ambler* is, I think, a mistake. The principle of the rule is, that the change of circumstances found a presumption that there is a change in intention, which may be as strong in favour of a second wife and family as a first; and it does not seem material whether the will was made by a widower having children, or a bachelor.

"The more weighty argument is drawn from the operation of the will, under the circumstances which have happened. The testator has given legacies which are not very considerable and the residue to his wife. That gift of the residue became void by her death. If he had *left* a second wife and son, they would have had their share with the other children. In *Brady* and *Cubitt* it is said by Lord *Mansfield* that there is no case of a revocation, where there is not a total disposition, intimating, that the ground of revocation is an entire deprivation. However that may be, if there is an ample portion remaining after a few legacies to friends, there is no decision that a will would be revoked. The principle on which the cases have gone does not militate against such a will.

"This case is not exactly similar; The testator gave the bulk of his property to his wife early after marriage She lived for several years, during which all their children were born. The birth of those children would not revoke the will, and he might mean to leave them in the power of their mother. She died; and it is not an improbable supposition, that he, knowing the effect of the will, suffered it to remain. There is a strong ground, then, to contend, that, under those circumstances, the case does not fall within the rule laid down and established for the revocation of wills.

"I was not aware of the case of *Barrow* and *Baxter*, in which the Court seems to think the subsequent death of the child would not make an alteration; but the point seems a good deal like that which has been *vexata quæstio* in these courts, and brought before the courts of common law, whether a will, which is revoked by another, is set up by the destruction of the second. There was a case to that

effect before Sir *Geo. Lee* of *Hellyar* and *Hellyar*, in which it is held, that the will being once revoked remained so. There was an appeal to the delegates, but it was never determined by them. The case of *Glazier* and *Glazier*, 4 *Bur.* 2512., was directly contrary to that; and it was held that the first will was good.

"In *Brady* v. *Cubitt* it was laid down by *Buller*, J. that implied revocations must depend on the circumstances *at the time of the testator's death:* That makes it material to inquire what those circumstances were. The fact is, that having embarked, they all perished. The *Roman* law has been entered into, and it clearly appears by the Prætorian, which is considered as the latter *Roman* law, that the revocation was entire and not presumptive, and yet the will was held to revive.

"With respect to the priority of death, it has always appeared to me more fair and reasonable in these unhappy cases to consider all the parties as dying at the same instant of time, than to resort to any fanciful supposition of survivorship on account of the degrees of robustness; and I rather suppose that is what is meant by Dr. *Zouch* in the passages alluded to.

"Then the testator, at the time of his death, had neither wife or children. *Buller*, J. says, It is to depend on the circumstances *at the time of the testator's death:* There is no circumstance to raise a presumption that he intended at that time that the will should be revoked.

"On the first point I should have great doubt if the presumed revocation did take place at all.

"On the second, As there were neither wife or children at the death of the testator, I am clearly of opinion that the Court ought to pronounce for the validity of the will."

As to parol declarations, *&c.*, concerning the subsistence or revocation of the will, *vide Brady* v. *Cubitt*, and *Doe* v. *Lancashire*, *ubi sup.*

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

See the stat. 13 H. 4. c. 7. 2 H. 5. c. 8. 19 H. 7. c. 13. and stat. 1 Geo. c. 5. 2 Rol. Abr. 82.

1. DOMINUS REX *v.* INGRAM & AL.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 215. S. C.]

INGRAM and many others were convicted of a riot on 13 *H.* 4. *c.* 7. before two justices of the peace, together with the sheriff. *Et per Cur.* 1st, If the rioters be convicted on view, the sheriff must be party to the inquisition; but if the rioters disperse before conviction upon view, the sheriff need not be party, for the justices may make the inquisition without the sheriff. 2dly, such inquisition by two justices is *pro domino rege*, and need not be alleged *capt. pro domino rege, & corpore comitatus*, as an inquisition by a grand jury, who inquire as well *pro corpore comitatus*, as *pro domino rege.* 3dly, if the justices

To inquisition of riot upon view, sheriff must be party, otherwise not, and such inquisition is pro rege only. See 6 Mod. 141. 1 Sid. 186. 1 Keb. 695. Raym. 386. Carth. 383. S.C. Comb. 423. Dyer 210. Raym. 386.

Vide 1 Hawk. c. 65. s. 31.

make not inquiry within a month after the riot, they are punishable; yet they may inquire after the month, for the lapse of a month does not determine their authority, but only subjects them to a penalty.

2. DOMINUS REX *v.* HEAPS.

[Pasch. 11 Will. 3. B. R. 1 Ld. Raym. 484. S. C. 12 Mod. 262. S. C.]

Indictment for a riot and assault, acquittal of the riot is so of the assault. Vide 1 Salk. 384, 385. 2 Show. 93, 149. Vide post 642. pl. 14. 2 Show. 93, &c.

[*594]

INDICTMENT, that the defendants *riotose & routose & illicite assemblaverunt, & sic assemblati existentes riotose & routose insultum fecerunt in quendam J. Russel, &c.* Upon not guilty, the jury found two defendants guilty, and acquitted the rest: And it was moved in arrest of judgment, that two cannot * make a riot, and therefore cannot be guilty of a riot, and that all are acquitted by this verdict. On the other side it was said, that the assault and battery is charged in the indictment as well as the riot; and two defendants may, as they are found, be guilty of that.

Vide 3 Mod. 141. Hawkin's P. C. c. 65. Vide 1 Str. 196. 3 Bur. 1264.

Sed per Holt, C. J. A riot is a specific offence, and the battery is not laid as a charge of itself, but as a part of the riot; for the *riotose & routose* runs through all, and is ascribed to the battery as well as the assembly. The consequence is, that these defendants being discharged of the riot, are discharged likewise of the battery; and no judgment can be given; and judgment was arrested.

3. DOMINA REGINA *v.* SOLEY & AL.

[Trin. 6 Ann. B. R.]

Unlawful assembly necessary to a riot. Vide Hawk. P. C. c. 65. 2 Hawk. c. 25. s. 55. et seq. Pop. 121. 2 And. 67. Moor 656. S. C. Holt 353. Rep. A. Q. 100, 115.

INFORMATION that the defendants *tiel jour & lieu ballivun & burgenses de Bewdley in Guilhalda Burgi præd. assemblat. ad eligend. ballivum burgi prædict. pro anno tunc prox. sequent. deservitur. in electione prædict. procedere vi & armis clarmoribus & vociferationibus illicite riotose & routose impediverunt.* The defendants were found guilty, and upon motion in arrest of judgment it was held naught. 1. Because it did not appear that any right is claimed, nor any such franchise pretended to, so that they might be doing an unlawful act (*a*); but if they had shewed a right to this franchise, this might be a disturbance to them in

(*a*) This point, which was not necessary to the decision, seems very questionable. The law will not suffer persons to seek redress of their private grievances by dangerous disturbances of the public peace. *Vide* 1 *Hawk.* ch. 65. s. 7.

the use of it; and to disturb another in the use of his just franchise, is an unlawful act. *Vide* 29 *E.* 3. 18. It is a trespass, *vide reg.* 94. *Asht.* 434. *Rast.* 662. 2dly, Because it is not said that the defendants unlawfully assembled; for a riot is a compound offence. There must be not only an unlawful act to be done, but an unlawful assembly of more than two persons.

Disturbing H. in the use of his franchise is a trespass.

4. DOMINA REGINA *v.* SOLEY & AL.

[Trin. 6 Ann. B. R.]

INFORMATION, that the defendants *illicite, riotose, & routose assemblaverunt ad pacem perturband. & vi & armis ostium cujusdam domus vocat.* the *Guildhall Burgi de Bewdley, clausum existen. de cardinibus riotose & routose elevaverunt.* The defendants were convicted, and upon motion in arrest of judgment it was held naught, because it did not appear whose house it was: If it was the defendants it was not an unlawful act. Every crime must arise from an unlawful act (*a*). It is said to be *vocat.* the *Guildhall Bergi*, but calling it so does not make it so. The *Guildhall* may belong to a private person as well as the borough. *Vide Dy.* 68. *Yelv.* 28. 3 *Cro.* 200. Y. the Chief Justice thought an assembly might meet together with such circumstances of terror as to be a riot. He called it a kind of assault upon the people. *Vide Hob.* 91. 1 *Mod.* 73. *West. Preced.* 149. *Lamb.* 108. 3 *Keb.* 623. 1 *Ro. Rep.* 49. 3 *Mod.* 3. *Moor* 786. *pl.* 1086.

Unlawful act to be done necessary to a riot. Vide 3 Inst. 176. Hawk. P. C. 157. S. C. Holt 353. Rep. A. Q. 100, 115. Vide Hob. 92. 5 Co. 91. b.

[595]

(*a*) *Vide* note to the preceding case.

5. DOMINA REGINA *v.* ELLIS.

[6 Ann. *At* nisi prius in Middlesex, *Coram* Holt, *C. J.*]

INDICTMENT against four defendants, for that they did riotously assemble, and *vi & armis* beat and wound one *Ellis*. Upon *non cul.* it appeared at the trial, that *Ellis*, who was the *Enfield* stage-coachman driving to *London* in the highway, the defendants, one in a chaise, and the rest on horseback, overtook him, and that the chaise was overturned by the coach, but not through any fault of the coachman; but that the driver of the chaise and his company taking offence at it, followed the coachman and beat him barbarously. It was objected upon this evidence, that this was a trespass, but not a riot, because the company was lawfully assembled. *Et per Holt*, C. J. 1st, If several are assembled lawfully without any evil in-

If three, or more, assemble lawfully, and quarrelling, fall upon one of their own company, it is no riot; if on a stranger it is, but in those only who concur. See 1 Mod. 13. cont. 2 Keb. 558. 6 Mod. 43, 141, acc. S. C. Holt 636.

tent, and an affray happens, none are guilty but such as act; but if the assembly was originally unlawful, the act of one is imputable to all.

Vide 1 Hawk. c. 65. s. 3.

2dly, If three, or more, are lawfully assembled, and quarrelling, all fall upon one of their own company, this is no riot; but if it be on a stranger, the very moment the quarrel begins they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in them that concur; so that it is a riot in them that act, and in no more. So ruled, and so found by the jury.

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[596]

Vide tit. Motion.

RULES OF COURT.

1. *SIR* JAMES BUTLER'S *CASE.*

[Mich. 6 Will. 3. B. R.]

Defeating a rule of Court by a stranger is a contempt.

UPON a rule of reference to arbitrators, they make an award for the plaintiff, and a stranger by contrivance defeats the party of the benefit of this award. *Per Cur.* It is a contempt of the Court, and an attachment shall be granted; for it shall not be in any one's power to defeat the rules of this Court, or render them ineffectual.

2. ANONYMOUS.

[Mich. 8 Will. 3. B. R.]

Construed largely.

IF a man enters into a rule in *B. R.* not to sue execution upon a judgment, and brings an action of debt upon the judgment, it is a breach of the rule. *Per Cur.*

3. GREGG'S *CASE.*

[Pasch. 5 Ann. B. R.]

Where an administrator sues, cannot bring money into court. See 6 Mod. 11, 25,

PER Holt, C. J. at the sittings at *Guildhall,* in an action by an administrator: The defendant cannot bring money into Court, because the administrator is not by law to pay costs; and, *Pasch.* 5 *Ann. B. R.*, in *Gregg*'s case, an action was brought by an executor for money due

to his testator for law-business done by him, it was moved to bring so much money into Court, but denied (*a*). 101, 153. Ante 593. H. 2 Ann. C. B.

Covenant and breach for non-payment of rent, and for not repairing, *&c.*, it was moved to bring in so much for the rent; and as to the other breach, that the plaintiff might proceed as he thought fit. *Et per Trevor*, All the judges have agreed, (for he put the case to *Holt*, C. J.) that it is but reasonable to allow it: That it does not differ from debt for rent; for though it be covenant, yet it is a covenant for payment of a sum certain. The same diversity was taken between *covenant* for a sum certain and *chose* incertain, *per Holt*, C. J., *Hill.* 9 *Will.* 3. *B. R.*, saying it did not differ from an *indebitatus assumpsit*. *Et Trin.* 12 *W.* 3. *B. R.*, same rule (*b*). Money may be brought into court; in covenant for rent, debt for rent, replevin and avowry for rent. S. C 1 H. Black. C. B. 24. Ante 89, 593. Mod. Cases 29. 1 Salk. 130. Holt 472.

[597] In a *quantum meruit* bringing money into Court was denied. *Hill.* 8 *Will.* 3. *B. R.*; but, *Pasch.* 5 *Ann.* *B. R.*, it was allowed *ex motione magistri Raymond.* Quantum meruit.

In trover for a horse, bridle, and saddle, it was moved to bring the saddle and bridle into court, but denied, *Trin.* 2 *Ann.* *B. R.*, *Wilcock's* the attorney's case (*c*).

Replevin, defendant avows for rent, and plaintiff admitted to bring it into court. *Hill.* 10 *W.* 3. *B. R.* (*d*)

In ejectment upon an entry for non-payment of rent, the Court staid all proceedings upon bringing all the rent into court (*e*), and accepting a new lease and sealing a counterpart. *Downes* v. *Turner*, *Mich.* 8 *Will.* 3. *B. R.*

(*a*) ***R. Crutchfield*** v. ***Scott***, *Str.* 796. that in an action by an executor the defendant may pay money into court; and it was held that the effect of it would be not to make the executor pay, but only lose subsequent costs. *Vide Barnes* 280.

(*b*) In covenant, a defendant was allowed to pay money into court upon breaches for nonpayment of rent, and money agreed to be paid for plowing meadow land; but not generally. ***Fullwell*** v. ***Hall***, 2 ***Bl. Rep.*** 837.

(*c*) In the case of ***Fisher*** v. ***Prince***, 3 ***Bur.*** 1363., the following rule was laid down ***per Curiam:*** Where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but its real and ascertained value must be sole measure of the damages; there the specific thing demanded may be brought into court. Where there is an uncertainty either as to the quantity or quality of the thing demanded, or there is any *tort* accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value; there it shall not be brought in.

In ***Whitten*** v. ***Fuller***, 2***Bl. Rep.*** 902. on trover for a bond, a rule to stay proceedings on delivering up the bond and payment of costs, was discharged; the plaintiff insisting to go for special damages, as the obligor had died during the detention.

(*d*) ***R. acc. Vernon*** v. ***Wyms***, 1 ***Hen. Bl.*** 24. *Vide Barnes* 429.

(*e*) By stat. 4 *G.* 2. ch. 28. if the tenant, at any time before trial in ejectment for nonpayment of rent, pay to the lessor or his attorney, or into court, all the rent due and costs, all proceedings in the ejectment shall cease.

In debt for rent, it was moved to bring so much into court (*a*), and *Holt*, C. J. thought it hard; he said he remembered the *beginning* of those motions; the first was to bring in principal and interest upon a bond; after that it came to an *indebitat. assumpsit:* It has been done in debt for rent, but not so freely: we do it in ejectment on a special reason, *viz.* because that action subsists entirely upon the rules of the Court. *Per Holt*, C. J. *Pasch.* 10 *W.* 3. *B. R.*

In debt upon a bond (*b*); defendant must bring in the whole penalty, or the Court will not stay proceeding. *Hill.* 9 *W.* 3. *B. R.* But *semble ne poct estre* without bringing the whole money. If the parties dispute the *quantum*, and there is a dispute how much is due, *ne poct estre referre. Trin.* 11 *W.* 3. *B. R.* (*c*)

(*a*) It may be brought into court, *Barnes* 280.

(*b*) By stat. 4 and 5 *Ann.* ch. 16. in any action on a bond with a penalty, with condition for payment of a lesser sum at a day or place certain, on bringing into court all the principal and interest due, and all costs in law or equity (*Vide Sisney* v. *Nevinson*, *Str.* 699. *Lock* v. *Shermer*, *B.R.Hard.* 116.), it shall be taken in satisfaction of the bond.—Upon bonds for payment of money by instalments, the instalments in arrear may be brought into court, *Lucas* v. *London*, *Str.* 958. *Barnes* 288. *Vide* 3 *Bur.* 1374. The defendant had leave to pay the penalty on a bond to indemnify a parish against a bastard into court, *Branguin* v. *Perrot*, 2 *Bl. Rep.* 1190.

(*c*) In *Str.* 787. it is said that the first motion to bring money into court was in *Kelyng's* time, and introduced to avoid the hazard and difficulty of pleading a tender.

In actions for mere *tort*, it has been repeatedly determined that money cannot be paid into court, *e. g.* for immoderately driving a hired chaise, *White* v. *Woodhouse*, *Str.* 787.; or for dilapidations, *Squire* v. *Archer*, *Str.* 907.; or for mesne profits after judgment in ejectment, *Holdfast* v. *Morris*, 2 *Wils.* 115.

Neither can it be brought in upon covenant to render the best beast or pay money at the *plaintiff's* election, *Barnes* 289.; nor on a bond from a bailiff for his good behaviour, *Barnes* 205.; nor on bond for performance of covenants in a lease, *Barnes* 286.

The general rule is laid down in *Hallet* v. *E. I. Comp.* 2 *Bur.* 1120. as follows: "Where the sum demanded is a sum certain, or capable of being ascertained by mere computation, without leaving any other sort of discretion to be exercised by the jury, it is right and reasonable to admit the defendant to pay the money into court, and have so much of the plaintiff's demand upon him struck out of the declaration; and that if the plaintiff will not accept it, he shall proceed at his peril."

In assumpsit against a carrier, the defendant was allowed to bring a sum of money into court, upon an affidavit that he had published an advertisement that he would not be answerable beyond that sum without a special entry, *Hulton* v. *Bolton*, *Hen. Bl.* 299. *n.* In *Gunning* v. *Moris*, 5 *Term R.* 87. the declaration stated that the defendant was indebted in a sum of *English* money on bond in a sum of proclamation money of *North Carolina* (dated before the *American* war); an application to pay into court the amount of the penalty in proclamation money was discharged, proclamation money having since the forfeiture lost its value. *Grose*, J. said, We ought not to permit money to be paid into court, and

to stay the proceedings, except where the justice of the case requires it; and this is not such a case.

In an action on which money cannot be regularly brought into court, (*e. g.* against an attorney for negligence,) if the plaintiff takes it out he waives the irregularity, *Griffiths* v. *Williams*, 1 *T. R.* 710. Money may be brought into court in actions upon penal statutes, *Str.* 1217.; and if two penalties are sued for, the amount of one may be paid generally, *Stock* v. *Eagle*, 2 *Bl. Rep.* 1052. In an action against three, one suffered judgment by default, another was outlawed, the third was not allowed to pay money into court, *Kay* v. *Panchiman*, 2 *Bl.* 1029.

4. ELLIOT *v.* CALLOW.

[Mich. 9 Ann. B. R.]

Though plaintiff is nonsuit, yet he shall have money brought in upon striking it out of the declaration.

DEFENDANT brought money, *viz.* 10 *l.*, into court, and had it struck out of the declaration. Afterwards the plaintiff suffered a nonsuit; and the question was, Whether he should be allowed to take this money? *Et per Cur.* He shall (*a*); for so much the defendant has ad-

(*a*) The plaintiff is entitled to have the money out of court, though he proceeds and has judgment which is arrested, *Fisher* v. *Kitchingman*, *Barnes* 284. If a verdict is given for the defendant, he may have the money paid in towards his costs, *Barnes* 280. *anon*, but if the plaintiff is a pauper it is otherwise, *Lee* v. *Holland*, *Bunb.* 287. Consequently the plaintiff is in all cases entitled to the surplus, if any, after deducting costs. Money paid into court under a rule, being a payment on record, the party can never recover it back, though it afterwards appear that he paid it wrongfully. *Per Buller*, J. *Malcolm* v. *Fullarton*, 2 *T. R.* 648.

In *Cromp. Prac.* 147. it is laid down, that if the plaintiff declares in assumpsit on an agreement, and defendant pays money into court, he admits the agreement, if the declaration is upon the agreement only; but if there are other counts, he may pay money into court on one of those counts, and then he will not admit the validity or extent of the agreement. In *Banough* v. *Skinner*, 5 *Bur.* 2639. being an action against an auctioneer, for a deposit upon a void sale, the defendant having paid money into court, the court were clear with the plaintiff as to the merits, and thought the defendant had *acknowledged himself to be liable* to the action by paying money into court. In *Cox* v. *Parry*, 1 *T. R.* 464. the defendant paid money into court upon an action on a policy of insurance; the plaintiff proceeded to trial, and obtained a verdict for a larger sum; but the court, on a motion for a new trial, were of opinion that the policy was void; whereupon the question arose, Whether the defendant, by paying money into court, had not precluded himself from making the objection; as to which it was held, that paying money into court admits the plaintiff has a right to maintain the action, and reduces the question simply to the *quantum* of damages which he is entitled to recover. In that case, if the defendant had not paid money into court the plaintiff must have been nonsuited, he has admitted that the plaintiff is entitled to maintain his action *to the amount of that sum*; but nothing more. He does not vary the construction and import of the policy so as to entitle the plaintiff to recover beyond that extent. In *Jenkins* v. *Tucker*, *H. Bl.* 90. the defendant having paid money into court demurred to the evidence, which Lord *Loughborough* said struck him as very

Vide Rep. B. R. Temp Hard. 206. Barnes 284. Pract. Reg. 250. Cas. of Prac. C.B. 36.

mitted to be due, and so much he has actually paid him; and if the cause had gone on to trial, there must have been a verdict for the plaintiff as to so much; for this is admitted to be due, and paid down as the plaintiff's money; otherwise perhaps of money paid into court by way of tender. If a man pleads a tender *& uncore prist*, and pays the money into court, and the plaintiff takes issue on the tender, and it is found against him, the defendant shall have the money. *Sty.* 338.

absurd, since the defendant admits a cause of action, so that there can be no such a thing as a nonsuit (1), and also because it was for the jury to determine upon the *quantum* of damages. If the plaintiff takes the money out of court in the first instance he is entitled to costs up to the time of paying it in. Where he proceeds afterwards, but discontinues or accepts the money, *&c.* before trial, he is entitled to costs to the time of paying it in, and the defendant to subsequent costs, *Barnes* 280, 282, 284, 287, 257. *Hartley* v. *Bateson*, 1 *T. R.* 629.; but if he proceeds to trial, and a verdict goes against him, *Stevenson* v. *Yorke*, 4 *T. R.* 10.; or he is nonsuit, *Kabell* v. *Hudson*, *id. ibid*; or juror is withdrawn, *Stodhart* v. *Johnson*, 3 *T. R.* 657.; he is not allowed any costs. If the defendant pay the money on particular counts, the plaintiff, on taking it out, is in the King's Bench only entitled to his costs on those counts, *Bailie* v. *Cazelet*, 4 *T. R.* 579. The contrary was ruled in *C. B. Hellier* v. *Hallett*, *Barnes* 286. The plaintiff must give the appointment for taxing, *Kabell* v. *Hudson.*

The Court of King's Bench, in a case where the action was attended with oppressive circumstances, allowed the debt to be paid into court without costs, *Johnson* v. *Houlditch*, 1 *Bur.* 578.

(1) *Qu. & vide Kabell* v. *Hudson*, *infra.*

[598]

SCIRE FACIAS.

1. PANTON *v.* HALL.

[Trin. 1 W. & M. B. R. Rot. 130.]

Judgment against two; scire facias against one, ill. Vide post 601. Faresl. 3, 4, 6. S. C. Carth. 105. Vide Co. Ent. 621. a. 1 Rol. Ab. 888. 10 Vin. 547. Allen 21. S. C. 3 D. 334. p. 6. Vide Skin. 82.

A JUDGMENT in debt was recovered against *A.* and *B.*, and a *scire facias* awarded against the tertenants and the heir of *B.* The sheriff returned a *scire feci* as to the heir, and returned several persons tertenants *in balliva sua*, warned; they appear and plead in abatement, no *scire facias* had been awarded against *A.* The plaintiff replied, that he at such a time sued out *scire facias* against *A.*, and set it forth. This replication was held naught on demurrer, for a *scire facias* is a judicial writ, and must pursue

the nature of the judgment; therefore as the judgment is joint, so ought the *scire facias;* whereas here they are as several independent suits. 2 *Ro.* 276. 20 *H.* 7. 3. *Cro. Car.* 517.

2dly, The return is ill, for it should not be, that *A. B.*, and *C.* are tenants of lands *in balliva sua*, but *A.*, *B.*, and *C.* are tenants of all the lands *in balliva sua*.

Return of sci. feci against tertenants ought to be of all the tertenants in balliva sua. Herne 326. 2 Brownl. 392.

2. TULLY'S *CASE.*

[Hill. 6 Will. 3. B. R.]

IN *error* to reverse a fine, though in strictness of law a *scire feci* being returned against the conusees, is sufficient; yet for fear of purchasers, and in favour of them, there shall be a *scire facias* against the tertenants.

Error to reverse a fine. 3 Mod. 274. 1 Salk. 339. Vide Hard. 163. Comb. 318. Dyer 321. Co. Ent. 233. Cro. El. 474, 739. Mo. 524.

3. HARDISTY *v.* BARNY.

[Hill. 7 Will. 3. B. R.]

IF a judgment be above ten years standing, the plaintiff cannot sue a *scire facias* without motion in court (*a*); if under ten, but above seven, he cannot have a *scire facias* without a motion at side-bar. *Note;* If after such motion and judgment revived by *scire facias*, the defendant dies before execution, the plaintiff must sue a new *scire facias*, but may have it without motion; for the judgment was revived before. *Per Cur.*

Where scire facias shall issue on motion, and where without S. C. Comb. 356.

(*a*) In *Coysgaine* v. *Fly*, 2 *Bl. Rep.* 995., on a judgment of above twenty years old, and in *Bagnall* v. *Gray*, *id.* 1140., on a judgment of ten years old, the Court of *C. B.* gave leave to sue out a *sci. fa.*; but execution only to issue on a return of *scire feci*, or an affidavit of personal service on the defendant.

4. ANONYMOUS. [599]

[Trin. 8 Will. 3. B. R.]

IN *C. B.* there is but one *scire facias* (*b*), and upon *nihil* returned execution. In the King's Bench there are two *scire facias*'s and two *nihils* returned, and heretofore both

Rule for suing out and returning scire facias. Faresl. 5, 6, 40,

(*b*) On which there must be fifteen days between the *teste* and return, *Imp. C. B.* 513.

56, 68, 69, 138. 6 Mod. 86, & infra, pl. 7 & 12. Cumberb. 452, 428. Prac. Reg. 495.

were sued out together by making the *teste* of the second as if the first were returned; but now the Court made a rule that both should not be sued out together, but the first should be duly returned before the second should be sued out, and that the second should be tested the day of the return of the first.

5. LUGG *v.* GOODWIN.

[Trin. 10 Will 3. B. R. 1 Ld. Raym. 393. S. C.]

Against principal in hac parte, and bail in ea parte. Faresl. 4. S. C. Cases B. R. 214.

A *SCIRE facias* upon a judgment against the principal defendant was, *in hac parte*. *Et per Holt*, C. J. on search of precedents; where it is against the defendant himself, it should be *in hac parte;* where against the bail, *in ea parte* (*a*), and this will reconcile the precedents.

(*a*) *In hac parte* against bail, ruled to be sufficient, and said by *Holt* to be the most proper, Lord *Raym.* 532. *Bringar* v. *Allanson.*

6. ANONYMOUS.

[Trin. 11 Will. 3. B. R.]

Scire facias against bail must lie in the sheriff's hands a convenient time. Bur. 1360.

A *CAPIAS ad satisfaciendum* against the principal in order to charge the bail must lie four days exclusive in the sheriff's office, but there is no set time for a *scire facias.* Same rule laid down *Mich.* 10 *W.* 3. *B. R.* But a *scire facias* against bail must lie a convenient time, and the first *scire facias* may be antedated even in term-time, *per Clarke* secondary. *Sed per Holt*, C. J. It cannot be antedated where it issues by rule of Court (*b*).

(*b*) The Court will not examine whether a *ca. sa.* be actually returned before the issuing of the *sci. fa.* the leaving it in the sheriff's office is a notice to the bail that the plaintiff will proceed against the person of the defendant, *Hunt* v. *Cox*, 3 *Bur.* 1360. 1 *Bl.* 393. The *scire facias* must lie in the office four days, *Agr. Millar* v. *Garraway*, 3 *Bur.* 1723. *R.* that it must lie in the office the last four days before the return, *Forty* v. *Hermer*, 3 *T. R.* 583.

7. GOODWIN *v.* PEEK.

[Mich. 11 Will. 3. B. R. Comyns 53. S. C.]

Fifteen days inclusive between teste of first and return of last, sufficient. Vide

THE first *scire facias* was tested the 24th day of *October*, and returnable the 31st *day* of *October;* the *alias* was tested the same day, returnable the 7th day of *November; Shower* objected, there ought to be fifteen days ex-

clusive between the *teste* of the first and return of the last. But the Court held, that here being fifteen days inclusive, it was very well, and practisers agreed it. *Vide 2 Jones* 228. (*a*)

post 602. 1 Lutw. 26. Mod. Cases 146. S. C. Carth. 468. Cases B. R. 215. Holt 759. Str. 1139.

(*a*) *Vide Peale* v. *Watson*, 2 *Bl. Rep.* 922. Four days exclusive are sufficient between the *teste* and return of the *sci. fa.* when the proceedings are by bill.

8. PROCTOR *v.* JOHNSON. [600]

[Pasch. 13 Will. 3. B. R. 1 Ld. Raym. 669. S. C.]

Vide 3 Lev. 100. Lutw. 1268.

ON a judgment in ejectment in *C. B.*, a *scire facias* was brought against the casual ejector, suggesting, that since the judgment *A.* and *B. ingressi sunt & modo tenent.* And on demurrer, judgment given *quod haberet execution.*, and upon this award of execution a writ of error was brought in *B. R.*, where the objection was, that a *scire facias* lay not on a judgment in ejectment; for at common law it lay only in real actions; and the statute gives it only in personal. *Vide 2 Inst.* 469. *Et per Holt*, C. J. 1st, At common law there was a *scire facias* on a judgment in real and mixed actions. It lay on a judgment in assize, for the land was bound by the recovery, which was a good title, and there was no other way to execute the judgment upon change of parties, as there was in case of judgment for debt and damages, where debt lay on the judgment.

Scire facias lies on a judgment in ejectment. Ante 258.

2dly, The *scire facias* may either be general against all tertenants, or against the tertenants, naming them (*a*). Writ general.

3dly, That strangers may falsify, but those that claim under the judgment are estopped and bound by the judgment.

(*b*) In *Comb.* 282. it is said, that if a person undertakes to name them, he must be sure to name them all.

9. WITHERS *v.* HARRIS.

[Mich. 1 Ann. B. R. (*Vide* this case, title *Ejectment*, pl. 11.) 2 Ld. Raym. 806. S. C.]

S. C. ante 258. 3 D. 331. p. 11, 332. p. 6. Far. 50, 64. 3 Salk. 319. Holt 77, 265.

IT was said by *Holt*, C. J. I am not satisfied with the opinion of my Lord *Coke* on *West.* 2., that at common law no *scire facias* lay on a judgment in a personal action, till *West.* 2. for the words *sive allia quæcunq; irrotulata* came after *contractus* and *conventiones*, and therefore cannot be construed of judgments; but the law has been otherwise taken, and I must submit; it is plain it lay on a judgment in annuity.

Whether scire facias lay in personal actions before West. 2.

S. C. ante 564. Post 659. 6 Mod. 132, 42. 3 D. 314. p. 6. Holt 612.

Scire facias against bail in B. R. must be brought in Middlesex, and not elsewhere. Lut. 1286. 3 Lev. 235, 245. Cro. Jac. 331. Hob. 195. Aleyn 12. 1 Cro. 312. Barnes 96. 2 Bl. Rep. 769. 1 Bur. 409. 2 Cromp. Prac. 81.

10. SHUTTLE *v.* WOOD.

[Mich. 2 Ann. B. R.]

ON a recognizance taken in *B. R.* the *scire facias* must be brought in *Middlesex;* for the recognizances there are not obligatory by the caption, but by their being entered of record in the court; so it is of debt: But on a recognizance in *C. B.* the *scire facias* may be laid in the county where the caption was, or in *Middlesex* where it is filed; for it is a record by the caption, and becomes immediately obligatory, and therefore may be brought there, and it is also filed at *Westminster* in *C. B.*, and there remains of record. *Vide Al.* 12. 1 *Cro.* 312. *Hob.* 195.

[601]

S. C. 1 Salk. 40. and post 679. 6 Mod. 134, 199, 226. 3 Salk 321. Holt 179. Lilly Ent. 398.

Tertenants returned for several parts cannot join in a plea which goes to one part only. See before 598. pl. 1. 2 Saund. 23. Faresl. 15. 6 Mod. 134, 199.

11. ADAMS *and* TERTENANTS OF SAVAGE.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1253. S. C.]

AN administrator brought a *scire facias* on a judgment recovered by his intestate against *H.* and the writ was general against such as were tenants of the land of *H.* at the time of the judgment. The sheriff returned several tertenants warned; among the rest one *A.*, seised of a messuage and of a manor called *D.* The tenants appear, and all join in this plea, *viz.* that *J. S.* is seised of the freehold of the manor of *D.*, *& petunt judicium de brevi, & quoad breve ill. cassetur. Et per Curiam* the plea was held ill; and resolved,

1st, That the tertenants cannot join in this plea, because they are severally returned one for one part, and another for another.

Where non-tenure may be pleaded generally or specially. Vide ante 569. Keb. 25, 50. 3 Lev. 205. 6 Mod. 226. 1 Keb. 55, 310, 351, 352. 2 Keb. 587, 636.

2dly, This is pleading a *non-tenure* by implication as to the manor of *D.* Now in a *scire facias* on a judgment in debt, or any personal action, the defendant cannot plead *non-tenure* generally, because it is contrary to the return of the sheriff, but he may plead a special *non-tenure* in such case; and so the law is now after long and great difficulty settled. 3 *Cro.* 872. 8 *E.* 4. 19. 9 *H.* 5. 11. But in a *scire facias* for execution in a real action, the defendants may plead a general *non-tenure;* because their freehold, which is much favoured in law, is in question.

2 Saund. 23. 1 Mod. 29. 1 Sid. 436. 2 Keb. 529, &c. Mo. 525.

3dly, The tertenants in this case may plead there be other tertenants not named in the same county, and pray judgment if they ought to answer, *quousque* the others be summoned, but ought not to pray, *quod breve cassetur;* for the Court ought never to abate the writ, but where the plaintiff can have a better writ; otherwise if the

writ had been particular in naming the tenants. *Vide* 2 *Saund. Jeffreyson* versus *Dawson*, a good precedent: And they seemed to doubt whether the tertenants could plead other tertenants not warned in another county (*a*); and the Chief Justice cited *Owen* 104., that tenant for years may be a good tenant to plead in bar to a *scire facias* to a personal action where damages are recovered, but not in a real action. *Vide Co. Ent.* 702, 624. 2 *Cro.* 506. *Cro. El.* 740. 2 *Saund.* 8. *Palm.* 241. 2 *Ro. Rep.* 53.

(*a*) It has been decided that they may so plead, *vide Prynne* v. *Slaughter*, 2 *Vent.* 104. 4 *Bac. Ab.* 419. *Clift.* 672.

12. BALL *v.* MANUCAPTORS OF RUSSEL. [602]

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1176. S. C.]

Scire facias on recognizance of bail assigning breach, that the defendant did not pay nor render prisonæ Mar. Mares. nostræ, sufficient. Vide Lutw. 1273.

SCIRE facias against bail, setting forth, *quod cum querens recuperasset* against one *Russel*, and the defendants *devenerunt plegii*, that he should either pay *vel se reddere prisonæ Maresc. Mareschal. nostra*. The defendant prayed *oyer* of the recognizance; and that was, that he should pay *vel se reddere prisona Mareschalli Mareschalsiæ dominæ reginæ coram ipse regina*, *quo lecto & audit.*, the defendant pleaded, that there was no *capias ad satisfaciend.* returned against the principal; the plaintiff replied, there was a *capias ad satisfaciend.*, and set it out; the defendant demurred. It was objected by *Pengelly*, that the *oyer* given was defective, not shewing of what term the recognizance was, so that it did not appear to warrant the *scire facias*, or that it is what the *scire facias* is brought upon: That the *capias* set forth appears to have but four days between the *teste* and return, and that there is no breach assigned by the *scire facias*, for the render by the recognizance ought to be to the marshal of the King's Bench prison; but the breach is, that he did not render himself *prisonæ Mareschalli Mareschalsiæ nostræ*, which is the prison of the palace. *Vide* 10 *Co.* 68. *b.* *Thes. Br.* 233. *N. Br.* 251. *J.* 5 *E.* 3. *c.* 8., and *Spelm. Gloss. in hoc verbo*. To this it was answered and resolved by the Court,

1st, That though the *oyer* be imperfect, yet there is no variance between the *scire facias* and recognizance, and since they agree together, the recognizance is a sufficient ground for the *scire facias;* but the defendant should not have gone on, but insisted upon his want of *oyer*.

Eight days must be between the teste and return of capias ad satisfac. against the

2dly, There ought to be eight days between the *teste* and return of the *capias ad satisfaciendum* against the principal, by the practice and course of the Court; and if the defendants had moved for the irregularity, the Court would

principal in order to charge the bail.

have helped them: But in point of law, the process of this Court may be returnable *de die in diem*, especially into *Middlesex;* and therefore they shall not take advantage of this which is but an irregularity, upon demurrer.

Vide ante 599. pl. 7. 439. Faresl. 40, 96, 138. 1 Lutw. 26. Q. 6 Mod. 86. Mod. Cases 146.

3dly, All other marshalseas were derived from the Earl Marshal of *England*, and the Marshal of the Household is never styled *Marcschallus Marcschalsiæ nostræ;* and this being a *scire facias* on a recognizance of bail taken here, the marshal here must be intended the marshal of this Court. *Judicium pro quer.*

[603]

13. ATTWOOD *v.* BURR.

S. C. ante 89, 402. Faresl. 3. Carth. 447. 3 Salk. 369.

[Pasch. 5 Ann. B. R. 2 Ld. Raym. 1252. S. C.]

Lilly Ent. 225, 403.

Judgment on a scire facias against bail, reversed for want of warrant of attorney. 5 Mod. 397. called Attwood v. Duell. 1 Salk. 89, 402. 6 Mod. 304. Comberb. 149, 161.

A WRIT of error was brought upon the award of execution on a *scire facias* against bail, and thereupon the record of the judgment against the principal was also returned. It was assigned for error, that the *scire facias* was sued out and prosecuted by *J. S.* his attorney; but no warrant of attorney entered of record. It was answered, that *J. S.* appears to have been the attorney in the principal cause, and in that to have had a warrant, but the Court reversed the judgment; for the record against the principal need not have been certified upon this writ of error, and the suit against the principal was another distinct suit; therefore there ought to be a particular warrant of attorney for this *scire facias* against the bail, and this warrant ought to be entered, not before the writ sued; for any body may sue out the *scire facias;* but upon the return thereof, for then the suit commences (*a*).

(*a*) *R.* That it is sufficient if the warrant of attorney be entered of the term the *placita* is of, though the writ is returnable, and the party appears the preceding term, *Henriques and others* v. *the Dutch W. I. Com.* 2 Ld. *Raym.* 1532. 2 *Str.* 807. *Vide Richards* v. *Brown, Doug.* 113. *Vide stat.* 25 *G.* 3. *c.* 80. *s.* 13 to 19. A *sci. fa.* is an action, *Co. Lit.* 290. *b.* *Treviban* v. *Lawrence,* 2 Ld. *Raym.* 1048. *Barlow* v. *Evans,* 1 *Wils.* 98. *Grey* v. *Jones,* 2 *Wils.* 251. *Pultney* v. *Townson,* 5 *Bl. Rep.* 1227. *Fenna* v. *Evans,* 1 *T. R.* 267.

14. ANONYMOUS.

[Pasch. 5 Ann. B. R.]

IN the case of the king there need not be any *scire facias* after the year.

SERVICE AND SUIT.

Vide Co. Lit. 70, 83, and 107. 3 Lev. 21. 4 Co. 8, 9, &c.

TOMKINS *v.* CROCKER.

[Pasch. 2 Ann. B. R. 2 Ld. Raym. 680. S. C. with other points.]

Service by doing suit to the court of a manor twice a year. C[illegible] 520. Sam[illegible] names. C[illegible] B. R. 369. Holt 452. 2 Lutw. 1211. N. L. 380. Lex Man. Ap. 67.

IN *replevin*, the defendant made conusance for fealty, rent, and suit of court, and the suit of court was laid to be suit to the court of a manor twice a year. The plaintiff confessing a tenure by fealty and rent, traversed the tenure by fealty and rent, and suit to the court of the manor twice a year. The jury found there was but one freeholder tenant of the manor, and that time out of mind an ancient court had been held before the steward, and that several freeholders, tenants, did suit to it, and that the plaintiff held by the service of doing suit *ad cur. man. præd. bis in anno apud man. præd.* Mr. *Raymond* objected, that the court found by the jury is not the court claimed by the conusance; for *curia manerii* is the court-baron, which is incident of common right, and therefore no title need be made for it, nay it cannot be prescribed for; whereas this court here found is a special customary court, for which he ought to make title in his conusance, and not a *curia manerii*. *Vide* 1 *Inst.* 58. 2 *Inst.* 99. 1 *Inst.* 268. *Noy* 20. *Et per Holt*, C. J. and *Powell*, J. As a court of pie-powders may be to hold plea of things out of the market, and yet is a court of pie-powders; so may a court of a manor be more than a court for suitors every three weeks, and yet be a court of a manor: There may be a manor court to be held before the steward *bis in anno*. *Vide* 1 *Leon.* 316. And it is to enquire of arrearages of rents and services: And the suit to such court shall be intended by reservation before the statute of *quia emptores terr.* *Vide* 12 *H.* 7. 18. One that is not resiant may be bound to do suit real; for it shall be intended a suit-service reserved on creating the tenure: And the Court held the principal case, that the suit set forth in the conusance was expressly found by the special verdict (*a*).

(*a*) It appears by the report in Lord *Raymond*, that the jury found the issue for the defendant *in totidem verbis*.

Vide ante 470, 474, 475, 476, 477, 479, 480, 482, 490, 491, 494. 5 Mod. 329. 2 Hawk. P. C. cap. 8. and Burrow's Sessions Cases.

SESSIONS GENERAL AND QUARTER.

1. THE *CASE OF THE PARISH OF* KING-LANGLY.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 481. S. C.]

Appeal may be adjourned from one quarter-sessions to another. Vide ante 494. Post 606, 608. S. C. Cases B. R. 266. Set. and Rem. 120, 114.

A MOTION was made to quash an order of sessions, because the justices had adjourned the appeal from one sessions to another, and so the determination upon the appeal was not at the next quarter-sessions: *Sed non allocatur*; for the appeal must be lodged at the next quarter-sessions; yet when it is lodged, the justices may adjourn it. *Per Cur.*

2. *Inter* THE PARISHES OF LINGFIELD *and* BATTLE.

[Pasch. 1 Ann. B. R.]

Sessions cannot be entered as sitting three days together. Ante 494. Post 606, 608. S. C. Set. and Rem. 143.

CAPTION of an indictment of sessions was, *sessio tent. vicesimo & vicesimo octavo die Julii, &c. Et per Holt*, C. J. It is naught, for though a sessions may adjourn from one day to another, and so sit by adjournment, yet it must not appear in a lump, as sitting three days together, but distinctly.

3. DOMINA REGINA *v.* SAVIN.

[Pasch. 2 Ann. B. R. 2 Ld. Raym. 871. S. C.]

Sessions cannot make an order to prosecute an offender out of the county-stock.

AN order of sessions was made, that the clerk of the peace should prosecute an indictment of barretry found against *J. S.*, and that the charge be allowed out of the county-stock. *Note;* By 43 *Eliz. c.* 2., the justices have power to dispose of the surplus to charitable uses; upon which clause it was offered to maintain this order: But the Court said this was not to take place out of the surplus, but out of the original stock; besides, a gift of lands to raise money to prosecute offenders, would not be good as a charitable use (*a*).

(*a*) Particular provision is made for the expence of prosecution in cases of felony by 25 *G.* 2. *c.* 36. 27 *G.* 2. *c* 3. 18 *G.* 3. *c.* 19. but there is no general provision for the prosecution of inferior offences. By stat. 12 *G.* 2. *c.* 59. *s.* 6. the treasurers of counties are directed to pay the money raised by

county rates, according to the direction of the general quarter-sessions for the purposes in the acts there recited, and for any other uses or purposes to which the public stock of any county, *&c.* is or shall be applicable by law. Upon which it has been ruled, that the quarter-sessions may order a sum of money to be paid for contesting the legality of a fine imposed on the county, *Rex* v. *Inhabitants of Essex*, 4 *T. R.* 591.

4. ANONYMOUS. [606]

[Mich. 2 Ann. B. R.]

WHEN a statute gives a penalty to be recovered before justices of peace, and prescribes no method, it ought to be by bill. *Per Holt*, C. J.

5. *Inter* THE INHABITANTS OF ST. ANDREW'S HOLBORN *and* ST. CLEMENT DANES.

[Mich. 3 Ann. B. R.]

Sessions may alter and set aside their own orders the same sessions. Ante 494, 605. Post 608. 5 Mod. 396, 417. S. C. 6 Mod. 287.

UPON a *certiorari* the following orders were removed into *B. R.* 1st, An order made at the general quarter-sessions of *Middlesex*, 1704, which recited an appeal made at the general sessions of the peace for the same county in *September* 1704, by the parish of *St. Clement Danes*, against an order of two justices, to remove one *Mary Gear* from *St. Andrew's Holborn* to *St. Clement Danes*, as the place of her last legal settlement; and that it was thereupon ordered, that the said appeal should be determined such a day this sessions, and that the churchwardens, *&c.* of *St. Andrew's Holborn* should then attend, and then went on and ordered, That forasmuch as it appeared to the Court upon oath, that a copy of the said recited order was served upon the Churchwardens, *&c.* of *St. Andrew's Holborn*; and for that the churchwardens, *&c.* of *St. Andrew's Holborn* had neglected to attend, the Court allows the appeal. 2dly, An order which recited, That whereas the churchwardens, *&c.* of *St. Andrew's Holborn*, had then paid in open court to the Churchwardens of *St. Clement Danes* 40*s.* costs allowed to them, because the churchwardens of *St. Andrew's Holborn* neglected to attend, upon which the appeal was allowed, and the order of the two justices vacated; and then ordered, that for good reasons shewn unto this Court, it is ordered, that the said recited order of this Court made on *Monday* last, be vacated and discharged, and that the said appeal be reheard. 3dly, An order setting forth, That upon hearing the appeal of *St. Clement Danes*, it not appearing that *Mary Gear* hath any legal settlement in *St. Andrew's Holborn*, or elsewhere,

save in *St. Clement Danes;* this Court doth dismiss the said appeal, confirm the order of the two justices, and order the said *Mary Gear* to be continued in *St. Clement Danes.* Mr. *Darnel* moved to quash the second and third orders; he argued, that the hands of the Court were tied up by the first order of sessions; *sed tota curia contra*, and *Holt*, C. J. That during the sessions, the order was in the breast of the Court; and though it was drawn up, yet it was so [607] far in the breast and power of the Court, that by the second order it ceased to be a record. The Court at the *Old Bailey* have altered and set aside their judgments ten times the same sessions; where judgment *de paine fort & dure* has been given, the Court have after let him in to plead, and after upon his trial he has been convicted, and has had another judgment against him to be hanged. So it is of judgments here; which during the same term are in the breast of the judges; but then, he said, they ought to set the first order wholly aside, and have entered up the third order as the only order; for the effect of the Court's setting aside of the first order is, that it ceases to be an order, and consequently ought not to be returned to us as an order vacated by another order, but it should have been annulled and made nothing; as in this Court we cannot enter up one judgment upon record, and then enter a *vacat* of that, and then enter a contrary one: The sessions as well as the term is but one day in law. But the matter was referred to the three *puisne* judges; *& sic quievit.*

1 Cro. 341.
1 Jo. 330.
1 Cro. 350, 351.

6. THE CASE OF FOXHAM TITHING *in Com.* WILTS.

[Hill. 3 Ann. B. R.]

Order of sessions quashed, because it concerned one of the justices named in the stile of court.
S. C. Set. and Rem. 171. Holt 517.

A JUSTICE of peace was surveyor of the highway, and a matter which concerned his office coming in question at the sessions, he joined in making the order, and his name was put in the caption. *Et per Holt*, C. J. It ought not to be; as if an action be brought by the Chief Justice of the Common Pleas in the Court of Common Pleas, the *placita* must be *coram Ed'ro Nevill Mil. & Sociis suis*, and not *coram Thoma Trevor, &c.* And it was quashed.

7. *Inter* THE INHABITANTS OF THE PARISHES OF SOUTH CADBURY *and* BRADDON *in Com.* SOMERSET.

[Mich. 9 Ann. B. R.]

ON an appeal to the sessions the Court discharged the first order, and now Mr. *Earl* moved to set aside the order of discharge, because the justices do not say whether they discharge it for form, or on the merits; for if it was for form, the parish is not bound; but if on the merits, the parish in consequence is hereby discharged for ever. *Et per Cur.* 1st, The justices are not bound to express the reason of their judgment in the judgment, no more than other Courts; and if it was otherwise held in the late Chief Justice's time, it past without due consideration. The reason of their judgment must be collected from the record; as where judgment is arrested upon an insufficient indictment. The sessions need not set forth the reason of their judgment. S. C. Sett. and Rem. 172.

* If the sessions reverse the first order, and that being removed appears to be good, this Court must intend it was reversed on the merits, and affirm the order of sessions. Orders reversed, ante 472, 486, 492, 494. 6 Mod. 287. [* 608]

If the sessions reverse the first order, and that being removed, appears not to be good, we must intend it was reversed for form, and affirm the order of reversal.

So if the sessions affirm the first order, and that appears to be good, we must affirm the order of sessions.

But if the first order appears bad, and the sessions affirm it, this Court must reverse it, because it appears naught.

SHERIFFS.

DOMINUS REX *v.* DAWS.

Vide 10 Co. 99, 100. 1 Salk. 99, 175.

[Hill. 13 Will. 3. B. R., 1 Ld. Raym. 722. S. C.]

DAWS was taken upon an attachment for a contempt *die veneris prox. post Crastin. Sanctæ Trin.* and the sheriff took a bail-bond for his appearance, and suffered him to be at large. *Daws* would not appear, the sheriff was amerced. The prosecutor refused to accept the assignment of the bail-bond; and *Raymond* moved, that farther Sheriff may take bail-bond on an attachment of contempt, but the prosecutor may refuse to accept it. Mod. Cas. 122. S. C. Cases B. R. 579.

amerciament might be stayed, and that the prosecutor might accept of the bail-bond, which was but in 40 *l.* and the prosecutor thought it too little. He urged, the sheriff was bound by the statute to bail and set him at large, and cannot seize him after the return; he has done all he can, and ought not to be amerced for not doing more than he can. No action lies against him in such case, there ought for the same reason to be no amercement. The Court agreed, that a bail-bond may be taken on an attachment, but said they could not oblige the plaintiff to accept the bail-bond, it might be insufficient; if it was, the sheriff might thank himself; if it be sufficient, he may, by suing the bail-bond, reimburse himself (*a*).

(*a*) In *Field* v. *Workhouse*, *Com.* 264. the defendant pleaded it was taken by the sheriff on an attachment for contempt of *C. B.* and void by the stat. 23 *Hen.* 6., and had judgment. *King*, Ch. J. said, that upon an attachment of privilege, attachment upon a prohibition, or *attachments in process* upon a penal statute, the sheriff might take bail, but not upon an attachment for a contempt. In *Say* v. *Ellis*, 2 *Bl. Rep.* 9. 5. it appearing on *oyer* of a bond that the condition was to answer a contempt in the Court of Chancery, the defendant demurred; the Court thought if there was any ground of exception he should have pleaded facts sufficient to bring the question before the Court, and gave him leave to plead, and judgment was afterwards signed for want of a plea. In *Studd* v. *Acton*, 1 *Hen. Bl.* 468. it was ruled on demurrer that an action cannot be maintained against a sheriff for refusing to take bail upon an attachment out of Chancery for a contempt. The Court did not give an opinion whether the sheriff has a right to take bail. *Vide Danby* v. *Lawson*, *Prec. Ch.* 110. *Eq. Ab.* 350. *Bland* v. *Riccard*, 3 *Leon.* 208. *Anon. Str.* 479. 1 *Vent.* 231. 2 *Vent.* 238.

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[609]

See 2 Inst. 301. 2 Leon. Cas. 114. 3 Co. 13. Vaugh. 169, 170, 373. Ray. 54, 191, 355, 356.

STATUTES IN GENERAL AND THE EXPOSITION THEREOF.

1. REX & REGINA *v.* BARLOW.

[5 W. & M. B. R.]

Where a statute directs a thing of a public nature, *may* is understood as *shall*. Q. Cro. Jac. 134. Cro. El. 655. 2 Inst. 118. Comb. 220. S.C.

INDICTMENT on 14 *Car.* 2. *c.* 12. against churchwardens and overseers, for not making a rate to reimburse the constables. Exception was taken, that the statute only puts it in their power to do so by the word *may*, *&c.* but does not require the doing of it as a duty, for the omission of which they are punishable. *Sed non allocatur;* for where a statute directs the doing of a thing for

the sake of justice or the public good, the word *may* is the same as the word *shall;* thus 23 *H.* 6. says the sheriff may take bail; this is construed, he *shall;* for he is compellable so to do. Carth. 293. Skin. 370. Set. and Rem. 212.

2. Bennet *versus* Talbot. Hill. 8 Will. 3. B. R. *Vide* title *Declaration,* pl. 2. pag. 212.

3. MILLS *v.* WILKINS.
[Hill. 2 Ann. B. R.]

S. C. 6 Mod. 62. 3 Salk. 331. Holt 662. 2 Hawk. P. C. 247.

Title no part of statute, but if set out wrong, is fatal. Vide 4 Co. 48. Cro. Car. 232 1 Jon. 50. Cro. Jac 140. Ray. 191, 192. Hard. 324. 3 Cro 186. Saund. 128. 3 Keb 461, 642, 648. Dyer 324. Hob. 310.

TRESPASS for taking several skins from the plaintiff. The defendant, as an officer, justified on 1 *Jac.* 2. *cap.* 22. about tanning, and set forth the title of the act, mistaking a word, by which it varied from the true title, and averred the skins were not dressed according to the intent of the statute; to which it was demurred, because no such act as is here set forth. *Vide Cro. Car.* 232. 3 *Keb.* 648. On the other side it was answered, that the title is no part of the act; that old statutes have no title, and the opinion of *Hale,* C. Baron, was cited. *Hard.* 324. *Vide Hut.* 56. *Hob.* 310. 11 *Co.* 33. 4 *Inst.* 345. *Holt,* C. J. The title is not a material part, neither is it necessary to set it forth; but yet it is a name given by the makers, and therefore you must describe it accordingly if you will describe it by its title; and they denied the opinion of my Lord *Hale,* saying, it was a sudden opinion. Judgment for the plaintiff (*a*).

(*a*) It may perhaps appear, that the rule by which a misrecital of the title, commencement, or provisions of an act of parliament, which it was unnecessary to state, is fatal, should be confined to those cases where the rest of the pleading is so connected by reference with the act described as to be imperfect without such description; and the description being false, the allegation, of which by reference it forms a material part, cannot be true. But that where the plea is, independent of the recital, perfect and sufficient, a variance in the merely superfluous recital will not be material. Thus, in the report of this case, 6 *Mod.* 62., *Holt,* Ch. Jus. said, "You tie your justification to an act so entitled, and if you cannot produce one you are gone." So in *Boyce* v. *Whitaker, Doug.* 94. the defendant having stated with some variance the stat. 23 *H.* 6. *c.* 9. relative to sheriff's bonds, and pleaded that the bond whereon he was sued was taken against the form of the *statute aforesaid,* the plea was held bad because the word *aforesaid* tied the party up to an exact recital. In *Lutw.* 140. it is held that if there is a material variance from a general statute, if the declaration conclude *cont. form. stat. in ejusm. cas. edit.* and not *contra form. stat. præd.* it is well. So in *Wendham* v. *Palgrave, Fort.* 372. *Str.* 214. the declaration recited that by a statute made in a parliament held the 8th day of *Jul.* 8th *Ann.* it was enacted, *&c.* when no such parliament was held, and concluded generally *cont. form. stat. ejusmod. &c.* the Court held that it was well enough; but contrary to the sta-

tute aforesaid would tie it up. Accordingly in 2 *Hawk.* ch. 25. s. 104. it is said, "It seems to be agreed that not only a misrecital of the day whereon the parliament was holden, but even a misrecital of the purview of a statute, may be salved by a general conclusion *contra form. stat.* without adding *prædict.*" The case, therefore, seems to stand upon the same foundation as every other where there is an error in an immaterial allegation, *viz.* that if the allegation is so connected with what it is material to aver, that the latter is solely referrible to it, and would be defective and imperfect without it, the error is fatal, but otherwise not. As to which, *vide Savage* v. *Smith*, 2 *Bl. Rep.* 1101. *Bristow* v. *Wright*, *Doug.* 664. *Gwinnett* v. *Philips*, 3 *T. R.* 643. and particularly *Peppin* v. *Solomons*, 5 *T. R.* 496.

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[610] STATUTES, AND THE EXPOSITION THEREOF.

S. C. 1 Show. 241, 266.

1. HOBBS *QUI TAM* v. YOUNG.

[Trin. 3 W. & M. B. R. Intr. Hill. 1 W. & M. Rot. 129.]

Exercising a trade by others is within the stat. 5 Eliz. Vide post pl. 2, 3, & 7. 3 Mod. 313. S. C. Carth. 162. Comb. 179. Shower 266. 11 Co. 53. b. Cro. Car. 347, 516, 517. 6 Mod. 21. Cro. Car. 516, 517. 1 Saund. 10. 1 Rol. R. 10. Hob. 211. 2 Bulst. 187. 1 Cro. 347, 349, 516. 8 Rep. 130. 11 Rep. 54. 1 Sid. 303. Cro. El. 872. Holt 66. 2 Ld. Raym. 1179.

DEBT on 5 *Eliz.* for using the trade of a cloth-worker, not being brought up an apprentice; upon *nil debet* the jury found, that the defendant was a *Turkey merchant*, and exported woolen manufacture into *Turkey*, and that he employed clothiers that had served apprenticeship to work the clothes in his own house, at his own charge, and with his own materials, which he sent into *Turkey* as merchandize, but that the defendant never served an apprenticeship. *Per Cur.* 1st, The defendant is the trader in this case, and the person that exercises the trade, because he employs the rest, who work but as his servants, and the loss and gain is to be his.

2dly, This is a trading within the statute; because the cloth is not confined to the use of his own family, but vended out for the sake of commerce; and whether the utterage be in *England* or in *Turkey* is not material.

3dly, That he that hath not served an apprenticeship is by this statute restrained to work as a trader, *either by himself or others;* for the intent of this act is to annex the benefit of trade to such as underwent the hardship of learning it, thereby to encourage labour in youth. And few would undergo the trouble of being apprentices, if they might employ others to work for them.

Vide Raynard v. Chace, 1 Bur. 2.

4thly, This is a negative statute, and no one shall exercise a trade against it, unless by virtue of a custom, as

the widows of tradesmen, who by custom carry on the trade of their husbands, which the Court held not within the statute. *Hutt.* 132. *Noy* 5. 1 *Saund.* 312. 2 *Bulst.* 191. *Cro. Car.* 516.

2. DOMINUS REX *v.* PARIS SLAUGHTER. [611]

[Hill. 11 Will. 3. B. R. 1 Ld. Raym. 513. S. C.]

BRODERICK moved to quash an indictment on 5 *Eliz.* c. 4. for using the trade of a fellmonger, not having been an apprentice seven years; he urged, that this was a business required no skill, for it was only to pull the wool from the skin. He cited 1 *Cro.* 499. Information for exercising the trade of a hemp-dresser reversed. One *Pasch.* 4 *Jac.* 2. for exercising the trade of a wool-comber, quashed. Of a pippin-monger reversed. *Sed per Holt,* C. J. If in the indictment it be averred to be a trade (*a*) at the time of making the statute, we will not quash it; for whether it was a trade then or no, or whether any skill be requisite to the exercise of it, is matter of fact proper for the trial of a jury: And there are many trades within the general words and equity of that act, beside those that are mentioned therein. The case of a costermonger is not yet determined, and the case of an upholster, 2 *Bulst.* 186., is not law. The Court would not quash it.

Indictment for exercising the trade of a fell-monger contrary to 5 Eliz. not quashed, because averred to be a trade at the time of making the act. Vide pl. 1, and 7. S.C. Holt 68. Cases B. R. 311. 2 Ld. Raym 1179.

(*a*) If a trade is mentioned in the statute, it is not necessary to allege that it was used at that time; 4 *Mod.* 145. *Rex* v. *Thoms*, *Bull. N. P.* 192.; otherwise it must be averred to be a trade used within the realm of *England* or *Wales* at the time of making the act, *ibid. Infra hoc regnum* is not sufficient, for that extends to *Scotland;* and averring the trade to be used in *Scotland* would signify nothing; *Rex* v. *Lister*, *Str.* 788. *Barnard, B. R.* 30.

3. DOMINA REGINA *v.* HARPER.

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1188. S. C.]

INDICTMENT for using the trade of a merchant-taylor contrary to the statute 5 *Eliz.* Serjeant *Broderick* moved to quash it, because it is not a trade within the statute. Quashed *nisi.* Some days after Mr. *Eyre* moved to quash an indictment against *Cornish*, for using the trade of a seamstress, not having served as an apprentice, and the Court refused, because it was set forth in the indictment to be a trade in *England* at the time of making the act; wherein the words are, *any craft, mystery, or occupation now used.* So that if this trade of a seamstress be not

Where the trade is averred to be a trade at the time of the act, the Court cannot intend it not within it.

within the act, the defendant would have the advantage of it upon the trial. But as to *Harper's* case, which Mr. *Eyre* put them in mind of, the Court seemed to think a merchant-taylor was nonsense and unintelligible; they did not know what a merchant-taylor meant, and so it differed. It is a good exception that it is not averred in the indictment, that the trade therein mentioned was a trade at the time of making the statute. *Domina Regina* versus *Cornish*, *eodem termino*.

[612]

4. BILLINGS *v.* EADS.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1214. S. C.]

H. may let coach-horses and coach-man without a license.

TRESPASS and special verdict found; the case was, a gentleman had a coach and harness of his own, and gave an inn-holder 100*l.* *per annum* to find him a pair of horses and a coachman: And the question was, Whether he could do this without a license to keep a hackney-coach, upon 5 & 6 *W.* & *M.* *c.* 22. *Et per Cur.* Though in the beginning of the licensing clause, *sect.* 3. and in the prohibiting clause, *sect.* 5. hackney-coach or coach-horses are mentioned in the disjunctive, yet that must be understood of coach-horses to be used with a hackney-coach, because all other provisions in the act, *viz.* the number, the fine, the rent, and the whole revenue reserved, is confined to hackney-coaches; and the party cannot forfeit, but where the commissioners may license; and it is an act of restraint.

5. ANONYMOUS.

[Mich. 4 Will. 3. B. R.]

Construction of the stamp act.

A WARRANT of attorney for entering up a judgment written upon a paper, which likewise contained a bond, and had only one stamp, whereas by the act concerning stamp-duties it ought to have two stamps: Judgment was entered up by virtue of this warrant. And now it was moved, that the judgment and execution might be set aside for this cause. *Sed per Cur.* There may be reason to refuse such a warrant of attorney in evidence, but no reason to make all void; for there is nothing in the act that imports that.

6. DUNN QUI TAM v. HINCHDY.

[Pasch. 5 Ann. B. R. 2 Ld. Raym. 1275. S. C.]

DEBT upon the statute 10 *W.* 3. *c.* 2. for twelve dozen of buttons, made *de ligno tantum* in imitation of, *&c.* The jury found the buttons were all wood but the shanks, which were brass, and that they were made in imitation, *&c.*, and that there were buttons made *de ligno tantum*, *&c.* *Weld* said, that now it appeared the statute was applicable, and might have its effect upon other buttons, and that a penal law was to be construed strictly, and not by intendment. *Vide* 2 *Inst.* 199. *Plo.* 47. *a.* But the Court resolved they were prohibited by the act; for the shank is no part of the button, but added to fasten it: And if buttons thus made in imitation, *&c.*, by having a brass shank added, should be out of the act, it would be in every body's power to evade it. Adjudged.

Debt sur stat. 10 W. c. 2. Vide 3 Lev. 290, 374.

7. DOMINA REGINA v. MADDOX.

[613]

[Pasch. 5 Ann. B. R.]

PER Cur. Upon indictments on the statute 5 *Eliz.* in evidence we allow following the trade for seven years to be sufficient without any binding, this being a hard law (*a*). Cited in Regina *versus* Franklin, 2 Ld. Raym. 1179.

Exposition of 5 Eliz. Vide ante pl. 1, 2, and 3. Cumb. 254, 255.

(*a*) *R. acc. French* v. *Adams*, 2 *Wils.* 168. *Wallen* v. *Holton*, 1 *Bl.* 233. A wife who has assisted her husband seven years, or a person who has served seven years as a journeyman, may exercise the trade; *Show.* 242. 3 *Keb.* 400. 12 *Mod.* 401. 10 *Mod.* 70. A person may exercise any number of trades in which he has been employed seven years; *French* v. *Adams. R.* 4 *Leon.* 9., that a person who has served an apprenticeship to any trade within the statute may follow any other trade within it; *S. P. Keble* 473. *Vide Bull. N. P.* 192.

Stat. of Winton, 13 E. 1. c. 12. and 27 El. c. 13. Vid. Hale's P. C. 71, 72. 3 Inst. 68. Dalt. c. 100. Staund. P. C. 27. 1 And. 116. 2 Sid. 44. 1 Sid. 139. 1 Leon. 323.

STATUTES OF HUE AND CRY.

1. ASCOMB *v.* THE HUNDRED OF SPELHOLM.

[Mich. 2 W. & M. B. R. Intr. Hill. ult. Rot. 901.]

S. C. 1 Show. 94, 241. 3 Mod. 287. S. C. called Ashcomb versus the Hundred of Elthorn. Carth. 145. Holt 637.

H. robbed, refusing to take the oath, cannot sue. Vide post pl. 3. 7 Co. 6, 7. Servant robbed of his master's goods, master may sue. Vide infra, and ante 440, 441. 2 Saund. 380. S. C. Carth. 145. called Ashcomb versus the Hundred of Elthorn.

AN action was brought by the master for the robbery of *A.* and *B.* his servants. The jury found the special matter, and that *B.* was a Quaker and would not take the oath (*a*), *viz.* that he knew none of the robbers. *Et per Cur.* 1st, The master may sue for the robbery of his servant, and the oath of the servant is sufficient. 2dly, The servant may also sue, for he had the possession. 3dly, If the servant be robbed in the presence of the master, the master must sue, and the oath of the master is sufficient. *Sty.* 156. But if the servant was robbed out of the master's presence, the servant must swear. 4thly, As to *B.*, who refused to swear, the hundred is not liable; for the statute of *Eliz.* was made in favour of the hundred to prevent confederacy and combination between the thieves and the party robbed, and it was the master's folly to employ such a servant.

(*a*) By stat. 7 and 8 *Will.* 3. c. 34. a Quaker's affirmation is of the same effect as an oath, except in criminal cases. The exception has been ruled to extend to an appeal for murder, *Castle* v. *Bambridge*, 2 *Str.* 854.;—a motion for an attachment for non-performance of an award, *Robins* v. *Sayward*, 1 *Str.* 441.;—a motion for an information for a misdemeanor, *Rex* v. *Wych*, 2 *Str.* 872.;—articles of the peace, *Rex* v. *Green*, 1 *Str.* 527.;—a rule to answer the matter of an affidavit, 2 *Str.* 496.;—an affidavit in defence of another against a rule for an information, but not in his own defence, *Rex* v. *Gardiner*, 2 *Bur.* 1117. It does not extend to affidavits concerning the appointment of overseers, *Rex* v. *Tanner*, 2 *Str.* 1219.; or to penal actions, *Atchison* v. *Everett*, *Cowp.* 382. *Vide Espinasse* 728.

Vide Style's Rep. 156. &c. supra. 1 Brownl. 155. 2 Leon. 82.

2. COMBS *v.* THE HUNDRED OF BRADLEY.

[Pasch. 5 & 6 W. & M. B. R.]

Servant robbed of his master's money may have an action against

IN an action against the hundred, the plaintiff declared, that he was possessed *ut de bonis suis propriis*, &c. The jury found the plaintiff was a servant, and was robbed upon

the road of 30*l.* of his master's money, and 20*s.* of his own. *Et per Cur.* The action well lies by the servant, for the money is his, and he is possessed *ut de bonis propriis* against all, and in respect of all but him that hath the very right. If a servant be robbed of his master's goods, he may maintain an appeal of robbery.

the hundred. S. C. 4 Mod. 333. Comb. 263. Holt 37. Cases B. R. 54. Comb. 263. 4 Mod. 303. Latch. 127.

3. DOWLEY *v.* THE HUNDRED OF ODIUM.

Vide 1 Show. 60.

[Mich. 6 Will. 3. B. R.]

IN an action upon the statute of hue and cry, a verdict was for the plaintiff; and Mr. *Clark* moved in arrest of judgment, that it appeared the oath was taken before a justice of peace of the county, and not a justice inhabiting within the hundred, according to 27 *Eliz.* But the Court held it good notwithstanding that, for the statute of *Winton* says no such thing, and 27 *Eliz.* does it only by way of direction; and the declaration had been good, though it had not shewn an oath taken before any justice at all.

Declaration need not set forth the oath to be taken before a justice of peace of the hundred. Vide ant pl. 1. 7 Co. 6, 7 Noy 155. 2 Vent. 215. 2 Saund. 423. 3 Salk. 181. Andr 115.

4. COWPER *v.* THE HUNDRED OF BASINGSTOKE.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 826. S. C.]

IN *debt on the statute of hue and cry*, a special verdict was found, that the plaintiff was travelling in the highway in the hundred of *Michael-River*, where he was set upon and carried into the hundred of *Basingstoke*, and robbed in a coppice in the highway of this hundred. The question was, Which hundred should be liable? And it was adjudged, that the hundred of *Basingstoke* should, for there the robbery was committed, and not before; and if these had been two counties, it is certain the indictment of robbery must have been brought in the latter where the goods were taken, and not in the first where the assault was made: Also the hundred is not liable for not preventing the robbery, but for not taking the robbers; for if they are taken, the hundred is excused. *Vide Hutt.* 125. *Goldsb.* 86. It was objected, that the taking, &c. should relate to the assault, and so it was a robbery *ab initio*, like the case of murder, where it is certain there shall be a relation to the stroke, which was the cause. In answer to which the Court took this diversity. As to forfeitures there shall be a relation to the first cause; so if there be a pardon of the stroke, it shall discharge the murder; but after the stroke, if one knowing thereof receives him, or if a constable arrests him and lets him go, the receiver is not accessary

Assault in the hundred of A., and goods taken in B., B. is chargeable. See 2 Cro. 675. March 11. Noy 52, 155. 1 Leon. pl. 72. 1 Sid. 263, 367. 4 Co. 41, 42 47. 5 Co. 2. pl. 39. 1 Co 99. Hale's P. C. 51. S. C. Far. 157. Rep. A. Q. 8. Holt 638. How murder has relation to the stroke. 1 Hawk. 79, 80. 2 Hawk. 180, 181, 320. 1 Show 60. 3 Salk. 184. 3 Mod. 258, 287. 5 Mod 150, 160, 263 2 Saund. 379, 380, 423. 4 Mod. 383.

to felony, nor the constable a felon; for it is not a felony till death ensue. 11 *H.* 4. 12. *b.* Otherwise as to collateral purposes; for if the stroke and death are laid at different days, and the indictment concludes, *et sic murdravit die & loco* of the stroke, it is naught; but the day and place of his dying is well. 4 *Co.* 41. *Plowd.* 401. But here the assault is not a necessary efficient cause of the robbery, as a stroke in murder is; therefore there is no relation in this case, because no necessity. It was objected, that if one be taken in the hundred of *A.* and carried into the hundred of *B.* into a house there, *viz.* a mansion-house, and robbed, or taken in the day-time in *A.* and carried to *B.*, and there robbed in the night, there shall be no remedy. And the Court said, those cases were not provided for by the statute. Adjudged *per Holt & totam Cur.* Also he said as to the assault's being in the coppice, that it was not necessary the robbery should be in the highway to charge the hundred. *And yet see Cro. Car.* 267., *where it is said, that the inhabitants are not bound to keep watch in a new highway, or to make amends for a robbery therein committed.*

Vide S P. 1 Show. 60. Comb. 150. 1 Goldsb. 155, 156. 2 Goldsb. 280. P. C. 2 Hawk. 202. Cro. Car. 267.

Who chargeable to the hundred on a hue and cry, vide 2 *Saund.* 423.

SUBSIDIES, TAXES, AND CUSTOMS.

1. BREWSTER *v.* KITCHEL.

[Hill. 9 Will. 3. B. R. *Vide* the state and resolution of this case, title *Covenant*, pl. 4. pag. 198.]

Taxes in general means parliamentary. 5 Mod. 368. S.C. Comb. 424, 466. S. C. 1 Salk. 198. S. C. S. C. Carth. 438. 3 Salk. 340. Cases B. R. 166. Holt 175, 669.

IN the debate of this case it was laid down by *Holt*, C. J. That the word *taxes*, generally spoken with reference to a freehold, or where the subject matter will bear it, shall be intended parliamentary taxes *propter excellentiam.* 34 *H.* 8. *Quinzim.* 9. But there be other taxes not parliamentary, as repair of churches, commission of sewers; for any imposition which takes away part of his goods or rent, is a tax. 2 *Inst.* 532.

Different manners of taxing, and when introduced.

The ancient way of taxing was by tenths and fifteenths, then by subsidies, after that by royal aids; at last by a pound-rate: The former were all on the person or personal estate, and were much the same thing; the latter

was upon rents and lands. Tenths and fifteenths were the most ancient. *Vide Spelman verbo Quindecima.* In 8 *Ed.* 3. a valuation was made on all the towns in *England*, and returned into the Exchequer, which became the standing measure for taxing. 2 *Inst.* 76, 77. From this when a tax was given, the officers of the Exchequer could easily compute what each town was to be charged with, and what it came to. *Vide* 11 *H.* 4. 35, 36. *Bro. Quinz.* 9. The first subsidy was in and by 32 *H.* 8. *cap.* 50. which was a tax upon the person for his lands and goods, payable by the party where he lived. This continued till 15 *Car.* 1.

The assessment or tax, according to a pound-rate, came in 17 *Car.* 1. In these assessments there was a clause to empower the tenant to deduct. So it was in 1642, 1644, 1649. And then, and upon this account it was, that in conveyances it came to be provided, that there should be no deduction for taxes.

2. TROWEL *v.* ELLFORD.

[Trin. 5 Ann. B. R.]

H. may be assessed to the land-tax either where he dwells or carries on his employment.

TRESPASS against the collectors of the land-tax; the case was, that the plaintiff lived in *Middlesex*, but exercised and followed the business of a factor in *Smithfield;* and the question was, Whether the commissioners of *Middlesex* where he lived, could tax him as living in *Middlesex*, or he should be taxed by the commissioners of *London*, as following his business in *Smithfield?* And *Holt*, C. J. held, That the action lay, and that he was not taxable by the commissioners of *Middlesex;* for by the very words of the act, he is to be taxed in the place where his office is exercised (*a*): *Cæteri Justic. contra*, for this is not an office which is local, but an employment which is personal, and the person is taxable where he lives; and the affirmative words of the act are directory. He is taxable in either place.

(*a*) An exciseman who executes his office in different places is chargeable where he resides; and it was ruled that trespass lay for distraining for it upon an assessment elsewhere; *Barrett* v. *Weeks*, *Str.* 417.

3. ROBINSON v. STEPHENS.

[Mich. 8 Ann. In Canc.]

Where there shall be deduction for taxes out of annuity, and where not.

IF one covenants to pay an annuity to *J. S.* the covenantor shall not deduct for taxes; for the charge is on the person of the covenantor, and not the land. So if *H.* having a term for years, devises an annuity to *J. S.* and his heirs, there can be no deduction for taxes, for the term for years is no otherwise chargeable with it, than as it is part of the personal estate; for it cannot be said to issue out of the term, when in point of duration it may continue much longer. So if *H.* grants an annuity to *J. S.* and afterwards secures it out of a real estate, there shall be [617] no deduction for taxes; for the subsequent security cannot lessen the effect of his former grant, which in its creation was tax-free. *Per Cowper*, Lord Chancellor, at his house.

4. PAUL v. SHAW.

[Hill. 8 Ann. In Cam. Scacc.]

Prisage, an ancient duty on goods, granted away by the crown, is chargeable with other duties charged on the same goods while in the grantee's hands. Concerning prisage, vid. Hardr. 56, 57, 218, 301, &c. 477. Davis 17.

ASSUMPSIT for 500*l.* received to the use of the plaintiff; on *non assumpsit* a special verdict was found, that King *Charles* I. gave to *J. S.* and his heirs, the duty of prisage of all wines imported, to hold discharged of all aids and taxes; and the question was, Whether the grantee should pay tonnage for this upon 9 & 10 *W.* 3.? *Note;* The duty of tonnage was first imposed *per* 12 *Car.* 2. *c.* 4. *viz.* 4*l.* 10*s.* on all *French* wine; then comes 1 *Jac.* 2. *c.* 3. and imposes 8*l.* *per* ton on *French* wine, with a clause, that the grantee of prisage should pay the duty; then comes 7 & 8 *W.* 3. *c.* 20. which imposes 25*l.* *per* ton; after that comes 9 & 10 *W.* 3. *c.* 23. which imposes over and above, a duty of 4*l.* 10*s.* to be levied according as it was by 12 *Car.* 2. And it was adjudged in the Exchequer, that the grantee should not pay this duty of tonnage. Upon this error was brought; and it was said for the grantee, that this was an ancient royal revenue, that if the crown now held it, tonnage could not be due, the queen could not pay a duty of tonnage out of her own prisage; that the grantee claimed under the crown, and ought to have the same privilege and exemption, the rather because it was granted with this immunity. But *per Trevor*, C. J. and several other judges in the Exchequer-chamber, it was answered and resolved, that immediately on importation, this duty of tonnage at-

tached upon the wine, and the grantee receives whatever part he takes for prisage charged with the duty; and this must be presumed to be the intent of the law; for it cannot be imagined the law meant to raise this duty on the people to enrich a private man, which would be the effect, if he may have his prisage custom-free. And the grantee paid the tonnage imposed by all former laws.

As to the reasons on the other side, they answered, If the prisage had remained in the crown, it could not have paid by reason of the unity of possession, it being absurd, that the queen should be chargeable with a duty to herself; but this exemption is only personal, and the duty revives when prisage comes to a subject, who may pay the duty to the crown, as where a parson leases his glebe. And as to the covenants or clause of discharge in the grant, that could only extend to the tonnage then in being, which he, though king, had himself, and not to what he had not, but might be given to his successors. And the judgment was reversed.

N. This judgment of reversal was affirmed in *Dom. Proc.* 1 *Bro. P. C.* 323.

SURRENDER.

[618]
Post 620, 621.

In the Case of Thompson *and* Leach. Hill. 9 Will. 3. B. R. (Which see, title *Remainder*, pl. 2.)

S. C. 3 Lev. 284. 2 Vent. 198, 199, &c. Ante 576, 427, and 565.

THE Court held, that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which no other act is requisite, but the bare grant; and though it be true that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent; yet that consent is implied; a gift imports a benefit, and an *assumpsit* to take a benefit may well be presumed; and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property, or sealing of a bond to another in his absence, should be the obligee's

Surrender vests the estate in the surrenderee without his express acceptance. 3 Mod. 301, 296. S. C. Cases in Parl. 150. Show. 296. Co. Lit. 266. b. S. C. Eq. Ab. 178. p. 3. 3 D. 164. p. 13. 3 Salk. 300. 3 Lev. 284. Comb. 438, 468. Carth. 211, 250,

435. Holt 357, 623, 665. Cases B. R. 475. bond immediately without notice (*a*). 2 *Vent.* 198. 3 *Levinz* 234. 2 *Shower* 196, 308.

See 3 Lev. 285. *That the judgment in the principal case was reversed in the House of Peers, in* 1692 (*b*).

(*a*) *Vide ante* 301. *Taylor* v. *Horde*, 1 *Bur.* 125.

(*b*) The judgment which was reversed in 1692 was in a former cause between the same parties; in which it was ruled in *C. B.*, *Trin.* 2 *W.* & *M.* 3 *Lev.* 294. 2 *Vent.* 198. and on error in *B. R. Hil.* 3 *W.* & *M.* 3 *Mod.* 296., that the surrender was void for want of acceptance. The reversal of those decisions was on the 23d *Dec.* 1692, *Journ. of the House of Lords*, vol.15th, pa. 163, by which the doctrine in the text was established. The cause which was decided 9 *W.* 3. was relative to the same surrender, but turned upon a different point; as to which, *vide* the reports *ante* 427, 576

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[619]

Vide ante 570.

TAIL.

S. C. 1 Salk. 338. 1 Show. 370. 4 Mod. 1. S. C. Faresl. 18. Holt 615. Rep. A. Q. 19. 3 D. 198. p. 10, 11.

1. Symonds *versus* Cadmore. Hill. 4 & 5 W. & M. B. R. Rot. 743. *Vide* this Case, title *Fines*, pl. 3. pag. 338.

2. MACHIL *v.* CLARK.

[Trin. 1 Ann. B. R. Intr. in B. R. Pasch. 12 Will. 3. Rot. 342. 2 Ld. Raym. 778. S. C. Comyns 119. S. C.]

Covenant by tenant in tail to stand seised to the use of himself for life, remainder to A. in tail, is void; because the remainder is to take effect after his death.

1 Mod. 28, 121, 159, 175. 3 Lev. 126, 306, 307, &c. 2 Lev. 75, 213, 225. 2 Mod. 207. 1 Vent. 372.

TENANT in tail covenanted to stand seised to the use of himself for life, remainder to *John* his eldest son in tail, and afterwards suffered a common recovery with single voucher, wherein he was tenant to the *præcipe:* And the first question was, What operation the covenant had? For if it made any alteration in the estate-tail, the recovery did not bar; and if it did not, the recovery and single voucher did bar. The Court held the recovery good, and affirmed the judgment; and *Holt*, C. J. delivered the opinion of the Court, and gave the reasons for it, the sum of which was,

7 Mod. 22, 23,

1st, That if tenant in tail by covenants to stand seised, or by lease and release, or bargain and sale, conveys to another and his heirs, it is a base fee, not determined nor

determinable till the entry of the issue; for before the statute *de donis*, he had a fee-simple; and the statute does not alter the nature of the estate, but restrain the power of alienation; and therefore as he might before the statute, so he may since; the statute only makes it voidable (*a*).

2dly, He has the whole estate in him, and therefore must be able to divest it, and so he said was *Seymour's* case in point, *viz*. Tenant in tail bargained and sold, the bargainee has a descendible fee. This case he held for law, but denied the case of *Took* and *Glascow*, 1 *Saund*. 260. and likewise *Litt*. § 612. if it be taken literally.

Bargainee of tenant in tail has a descendible estate.

3dly, This appears from 3 *Coke* 84, 613. If tenant in tail grants a rent, advowson, &c. it is not void as to their issues, but voidable; for if he brought a *formedon*, the defendant may plead a warranty. *Vide Winch*. 5 *Bridg*. 77. But this is still more apparent from the common case, where tenant in tail makes a lease not warranted by the statute, it is not void as to the issue, but voidable; and tenant in tail may exchange with a tenant in fee, in which case a fee is given and taken without livery: *Ergo*, tenant in tail may also covenant to stand seised. If tenant in tail by lease and release, by bargain and sale, or by covenant to stand seised, convey to another and his heirs, the estate-tail is not in abeyance, but in the alienees, for the law puts nothing in abeyance, but of necessity; and it is not the tenant in tail; for he cannot bring waste, &c. *Vide Hob*. 339. *Yelv*. 51. 1 *Leon*. 110. 1 *And*. 191. 3 *Cro*. 395. But he held that the present conveyance did produce no alteration in the estate-tail, because the estate in remainder was to commence after his death; and took this difference,

What conveyances by tenant in tail are defeasible by the entry of the issue. Co. Litt. 327. b.

[620]

If tenant in tail make a future lease for years, which by possibility may be to commence during the life of tenant in tail, it is not void, but voidable as to the issue.

1 Rol. 842. l. 50, 843. l. 15. Plowd. 437.

But if it be a future lease to commence after the death of tenant in tail, it is merely void in its creation; for it is not to commence till the title of the issue commences, and that is an elder title concurring with it; and if the law should make it otherwise than void, the law would make him a trespasser. *Vide Dy*. 279. *pl*. 7. 2 *Cro*. 565.

1 Sid. 261. Carth. 257.

So in covenant, if one covenant to stand seised to the use of *A*. and his heirs, or to the use of *A*. for life, remainder to *B*. in fee, the covenant is not void, but puts the estate-tail out of the covenanter.

Tenant in tail covenants to stand seised to the use of A. and his heirs, or

(*a*) ***R. ac. Goodright ex dem. Tyr-...l* v. *Mead* and *Shelson*, 3 *Bur*. 1703. *Vide ac. Stapleton* v. *Stapleton*, 1 *Atk*. 2. *Butl. n. Co. Lit*. 326. *b*. 331. *a*. *Plowd*. 557. *Wright's Ten*. 186.**

A. for life with remainders, it divests the estate-tail; otherwise if the new use be to take effect after his death.

But if tenant in tail covenant to stand seised to the use of *A.* and his heirs after his death, it is void.

2 Rol. 790. l. 37.

So it is in the case at bar, tenant in tail covenants to stand seised to the use of himself for life, remainder to *J. S.* and his heirs; for the remainder is to take effect after his death, when by his death the title of the issue commences, and the covenant as to the estate for life to himself is void in this case, because here is no transmutation of possession; such covenant is in any case only good in respect of the remainders, and since the remainders are void, the covenant and the first estate are likewise void.

3. IDLE *v.* COKE.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1144. S. C. 1 P. Wms. 70. S. C.]

Surrender to A. for life, remainder to A. and his wife for their lives, and their heirs and assigns; and for default of such issue to A. and his heirs, is a fee in A. and his wife.

H. SEISED in fee of a copyhold, surrendered the same to the use of himself for life, and after that to *Valentine* his son and *Alice* his wife, *pro & durante termino vitarum suarum naturalium & hæred. & assignat. prædict. Valentini & Alicæ. Et pro defectu talis exitus*, to the use of himself and his heirs. And it was held *per totam Curiam*,

S. C. 3 D. 186, pl. 14. Rep. A. Q. 57. Holt 164.

Vide ante 618. Surrender to be construed as a conveyance at common law.

[* 621]

* 1st, That a limitation of uses in a copyhold surrender must be construed by the same rules and in the same manner as if it were a limitation in a deed of feoffment, or any other conveyance at common law (*a*); and that the intent of the party is not sufficient as in a will, for the statute 32 *H.* 8. leaves the testator at liberty to express his intent as he pleases; but the common law ties up conveyances to set form and set words.

In a gift in tail it must appear of what body the issue are to come.

2dly, In a gift in tail it must be limited of what body the issue is to come, so as it may appear by the express words, or something tantamount or equivalent; and therefore a gift to *H.* and his heirs males, or a gift to *H.* and his heirs females, is not an estate-tail; because it is not

(*a*) This point is recognized in the cases of *Sutton* v. *Stone*, 2 *Atk.* 101. *Lovell* v. *Lovell*, 3 *Atk.* 11. In *Fisher* v. *Wigg*, *ante* 391., 1 *P. Wms.* 14., the majority of the judges held, that a surrender might be construed as a will in creating a tenancy in common. In *Rigden* v. *Vallier*, 2 *Vez.* 252., Ld. *Hardwicke* thought that upon a covenant to stand seised (and *come semble* in case of surrenders) there was a difference between words of regulation or modification of the estate, and words of limitation.

The limitation in this case would in a will have clearly been an estate-tail; *Vide Morgan* v. *Griffiths*, *Cowp.* 234.

said, nor does it appear of whose body they are to issue. At common law this would not have been a fee-conditional; and the statute *de donis* does not create estates-tail, but preserves them: A fee at common law was either absolute or restrained; those restrained fees were either restrained as to duration, as a gift to *A.* and his heirs, while such a house stood, *&c.*, which was a base fee; or restrained as to what particular heirs, or of whose body issuing should inherit, which was a fee-conditional, and is by the statute turned into an estate-tail; *ergo* this is a fee simple at common law, and is so at this day; for there are words to create an estate of inheritance, but none to restrain that to issue or heirs to the body of the said party: But a gift to a man, and the heirs males of his body, is an estate-tail; so is an estate to husband and wife, *& heredibus de ipsis procreatis*, for *de ipsis* is tantamount; so if a gift be to *H.* and his heirs, if he have issue of his body; and if he die without heirs of his body, the remainder to himself and his heirs; for here is an inheritance created, and it is manifest he meant heirs of his body, *& voluntas donatoris in charta doni sui manifeste expressa de cætero observetur*, and this is a necessary implication. *Jenk.* 171. 5 *H.* 6. 6. So if a gift be to *A. & heredibus suis si hæredes de carne sua habuerit, & si nullos hæredes de carne sua habuerit*, remainder to the donor: So if lands be given to *A.* [*and his heirs*] *& si contingat ipsum obire sine hæredibus de corpore suo*, remainder to the donor, is an estate-tail, *per Holt*, C. J. though not given to him and his heirs. *Quære.*

Fee absolute, base, restrained, conditional. 2 Bl. Com. 104.

By what words tail may be created. Vide Co. Lit. 20. 10 Co. 87. Moor Cas. 940. Carth. 343. 5 Mod. 267. 3 Lev. 70. Ld. Raym. 101. Plowd. 141. a.

3dly, They agreed *Beresford's* case, *viz.* a feoffment to the use of *A.* for life, remainder to *B.* and the heirs males of the said *B.* lawfully begotten, and for want of such issue lawfully begotten, to, *&c.* to be an estate-tail; for of the said *B.* is *de dicto B.*, or *ex dicto B.*, which is sufficient to denote *ex quo corpore;* so if it were in *Latin*, *remanere prædict. B.*, *& hæredibus de dicto B.*, or *ex dicto B.* But if it were in *Latin remanere dicto B. & hæredibus suis*, or *hæredibus ipsius & pro defectu talis exitus*, remainder over, it had been no estate-tail.

To B. and the heirs males of the said B. lawfully begotten, and for default, &c. over is tail.

4thly, It was agreed *per Holt*, C. J. *Powys* and *Powell*, Justices, that *Valentine* and *Alice* had a fee-simple, and not an estate-tail, because the words, *& pro defectu talis exitus* imports nothing of their dying without issue; it is not said *pro defectu talis exitus de corporibus dict. Valentini & Aliciæ* or *de prædict. Valentino & Alicia*, but generally, whereas every heir is the issue of somebody. If there had been particular words expressed, as if *they die without heirs of their two bodies*, there might be reason to turn the express estate of fee-simple raised into tail, which cannot be altered upon a bare implication, the rather in this case because of the word *assigns;* for an estate tail is not an assignable estate.

[622]

2 Bl. Com. 115.

7 *Co.* 40. *Litt. Rep.* 344. 1 *Cro.* 363. 3 *Cro.* 478. *Plowd.* 541. 3 *Leon.* 5. *Hob.* 32, 37. *Ass.* 15. 1 *Cro.* 366. 2 *Sid.* 41. *Gould*, J. *contra*, because the intent of the party was to create an estate-tail; and the word *of* in *English* is equal and tantamount to *de* or *ex* in *Latin*.

Of equal to *de* or *ex* in Latin.

Vide 5 Co. 114, 115. 8 Co. 147. Lit. Rep. 33, 34. 2 Inst. 107. 1 Lev. 44. 2 Cro. 627. Dyer 300.

TENDER AND REFUSAL, AMENDS, &c.

1. GILES *v.* HART.

[Mich. 9 Will. 3. B. R. 1 Ld. Raym. 254. S. C.]

To a general assumpsit, tender and refusal must be pleaded with a tout temps prist, which cannot be after imparlance. 2 Lev. 209. 3 Lev. 24, 103, 146, 277, 440. 1 Show. 129, 130. Comb. 441, 334. Ven. 322. S. C. Comb. 443. Carth. 413. 3 Salk. 343. Holt 556. Cases B. R. 152.

INDEBITATUS assumpsit and *quantum meruit*, and that being requested at such a day and place, the defendant refused to pay. The defendant pleaded, that at such a day, before the request, he tendered, and the plaintiff refused; and that afterwards he was always ready, and tenders the money into Court. Plaintiff demurred, because the defendant had imparled, and because it is not pleadable in an *assumpsit*, and because here was no answer to the special request. *Et per Holt*, C. J. Where the agreement is to pay at a certain time; tender at that time, and always ready, is a good plea; but where the money is due and payable immediately by the agreement, the party must plead *tout temps prist* from the time of the promise: But this cannot after imparlance (*a*); for by that it appears he was not always ready; otherwise if no imparlance, then he might have pleaded *tout temps prist* notwithstanding the special request laid in the declaration, because it was immaterially alleged there: so in debt, though the plaintiff lay a special request, the defendant may plead *semper paratus*, and pray judgment *de dampnis*: And the plaintiff may reply a special request to shew the defendant was not always ready: So in the principal case: Yet there is a difference between debt and *assumpsit*; for in debt the damages are but accessary, but in *assumpsit*, are the principal: Therefore in debt, the defendant may plead in bar of the damages; but in *assumpsit* the defendant ought to plead *always ready*, with a *profert in cur.*, and demand judgment *de ulterioribus dampnis*.

[623]

S. C. Carth. 413. In pleading tender in debt, defendant prays judgment de dampnis; in case, de ulterioribus dampnis.

(*a*) *Vi. Clift.* 203. *Lut.* 227. 376. *Barnes* 342, 354. *R. H. Bl.* 369., *Forte.* that a tender may be pleaded after a judge's order for time.

2. SWEATLAND v. SQUIRE.

[Hill. 10 Will. 3. B. R.]

INDEBITATUS assumpsit: The defendant pleaded, that before the action, *viz.* such a day he tendered the sum of so much money, and that he was always after ready, and now is ready, and prays judgment *de dampnis.* Plaintiff demurred. *Et per Cur.* It is enough that he was always ready since the tender; the money was due before, and the neglect of payment was a delay, a breach of contract and a cause of action; now here is no damages for that, but those damages and all that part of time remains unanswered, in respect of which the plaintiff ought to have judgment. *Note;* The counsel for the defendant said, that interest was due for the time unanswered, and damages would be recovered in respect of that interest. *Quod fuit negatum per Powell,* J. Interest is recovered by way of damages where damages are recovered *ratione de tentionis debiti;* but not where damages only are recovered, for interest is not recovered *occasione dampnorum.* Judgment *pro quer.*

Tout temps prist. Lutw. 226, 283, 368. Comb. 443, 444. 2 Lev. 209.

Interest not recoverable where damages only are recovered.

3. LANCASHIRE v. KILLINGWORTH.

[Trin. 13 Will. 3. B. R. 1 Ld. Raym. 686. S. C. Comyns 116. S. C.]

H. COVENANTS at two days notice to accept 1000*l.* stock at any time within twelve months, and to pay 2000*l.* on the transfer; and the plaintiff shews, that on the second day of *November* he gave the defendant notice he would be at the place the fourth, and that he was there, *& obtulit,* and that the defendant was there. *Per Cur.* When both parties meet at the time and place, he that pleads a tender must also plead a refusal; otherwise such a plea is naught on demurrer, but good after verdict; and if the defendant be absent, he must shew that, and also that he was at the time and place, and tendered. *Vide* 1 *Sid.* 31. 17 or 7 *E.* 3. 11. 2 *Saund.* 350. *Peters* and *Opie.*

When both parties meet, refusal must be shewn. 1 Saund. 320. 2 Saund. 350. Lutw. 568. S. C. 3 Salk. 342. Cases B. R. 529. [Sayer 189.]

1 Str. 535. Doug. 730. (703.)

*2dly; He that pleads a tender at the time and place, and no one there to receive, must shew at what time of the day he was there, and how long he staid; for he ought to shew that he has done all that could be done on his part to accomplish what by his agreement he was bound to do (*a*). 6 *Co.* 114. *Yelv.* 38. 2 *Cro.* 13.

If one comes not, the pleader must shew when he came, and how long he staid.

[* 624]

(*a*) *Vide ac. Str.* 544, 777. 3 *Bro. P. C.* 92.

Must stay till sun-set, unless special circumstances shewn vary it. Vide 2 Inst. 107. 8 Co. 147.

3dly, The last part of the day is the time the law appoints for a tender, but it must be time enough before sun-set for transacting the matter which is tendered: Yet in the case at bar, wherein there could be no transfer, but at the hours of the company, *i. e.* from ten to twelve, *&c.*, the plaintiff must aver the usage of the company, and shew that he came accordingly and staid so long.

Ante 514. Post 650. 1 Lev. 176, 196.

TERM-TIME, AND COMPUTATION.

1. ANONYMOUS.

[Mich. 10 Will. 3. B. R.]

PER Holt, C. J. Mr. Justice *Twysden* used to cite the book of *E.* 4., and say, they were to hear no law the last day of the term.

2. ASMOLE *v.* SERJEANT GOODWIN.

[Trin. 11 Will. 3. B. R.]

Sundays and holidays computed for acts to be done out of court. Vide post pl. 6. 6 Mod. 252. 8 Mod. 27. 3 Burr. 1595. H. Bl. 9. 3 T. R. 642. 4 T. R. 557.

CASE against the *custos brevium*, the declaration was delivered on *Friday* morning, and rules given to plead within four days, whereas, *Holidays* and *Sundays* were not juridical days. *Et per Cur.* We reckon them *non juridici* as to matters to be transacted in court, and therefore *Sundays* and *holidays* are no days to move in arrest of judgment. But as to business done out of court, as rules to plead within four days, *&c.*, *Sundays* are reckoned the same with other days.

[625]

3. SIR ROBERT HOWARD'S *CASE.*

[Trin. 11 Will. 3. B. R. At the sittings *at* Guildhall.]

Insurance of H's life for a year. H. died on the last day: Insurer liable. Vide ante 413. 5 Rep. 1. b. 3 Lev. 438. 5 Co. 1, 94, 100.

A POLICY of assurance was made to insure the life of Sir *Robert Howard* for one year, from the day of the date thereof; the policy was dated on the 3d day of *September* 1697. Sir *Robert* died on the 3d day of *September* 1698, about one o'clock in the morning. *Et per Holt*, C. J. In an action hereupon it was ruled at the sittings at *Guildhall*, 1st, That *from the day of the date* excludes the day, but

from the date includes it, so that the day of the date is excluded. 2dly, That the law makes no fraction in a day, yet in this case he dying after the commencement, and before the end of the last day, the insurer is liable, because the insurance is for a year, and the year is not complete till the day be over: Yet if *A.* be born on the third day of *September*, and on the second day of *September* twenty-one years afterwards he makes his will, this is a good will; for the law will make no fraction of a day, and by consequence he was of age.

2 Bulst. 83, 305. S. C. Holt 195. 2 Mod. 281. Hob. 139.

4. ALLEN *v.* BROOKBANK.

[Trin. 11 Will. 3. B. R.

UPON a libel in the Spiritual Court for incontinency, the citation was served on the *Sunday*, and fixed on the church-door, and that was objected to be void, because it is a process. *Vide* 22 *Car.* 2. *Holt*, C. J. That statute extends not to this process, nor to summons at the church; but only to such process which may as well be executed at any other time.

Citation may be served by fixing on the church door on Sunday. 5 Mod. 450. Carth. 504.

5. LORD BELLAMONT'S *CASE.*

[Pasch. 12 Will. 3. B. R.]

THE attorney-general moved for trial at bar last paper-day in the term, in an action against the governor of *New-York*, for matter done by him as governor (*a*); and granted, because the king defended it.

Trial at bar last paper-day. Post 651.

(*a*) *Vide Cowp.* 161.

6. SIR CHRISTOPHER HALES *v.* OWEN.

[Trin. 2 Ann. B. R.]

SUNDAY is not included in the four days to move in arrest of judgment, but the defendant must have four juridical days. *Vide post* 627. 6 *Mod.* 252., *ante pl.* 2. (*b*)

Sunday not included in the four days to move in arrest of judgment.

(*b*) *D. ac.* 4 *Bur.* 2130.

Note: Bail may apprehend his principal on a Sunday. Judge Blencowe's MS. Mich. 3 Ann.

7. PARKER v. SIR WILLIAM MOOR.

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1028. S. C.]

H. may be taken on an escape-warrant on Sunday. S. C. 6 Mod. 95, 21, 22, 63, 96, 154, 254. 5 Mod. 95, 450. 3 Salk. 148. Bl. Rep. 1273.

ONE was taken on a *Sunday* by virtue of an escape-warrant, and it was held good; for one may take another on a *Sunday* upon fresh pursuit, and this is in the nature of it, though it be by a new method, for this is no original process, but the party is in still upon the old commitment continued down (*a*).

(*a*) *Vide* note to *Wilson* v. *Tucker*, 1 *Salk.* 78., and add, that a defendant in a penal action cannot be taken in execution on a *Sunday*. *Rex* v. *Myers*, 1 *T. R.* 265.

S.C. 6 Mod. 148, 159, 196. Holt 761.

8. HARVY v. BROAD.

[Pasch. 3 Ann. B. R.]

Tres Trin. on Sunday, writ of inquiry then returnable, executed Monday, error. 1 Jon. 301.

A WRIT of inquiry was returnable *tres Trin.*, which was *Sunday*, and the writ was executed on the 14th, and that was *Monday*, which was kept as the *essoin-day*, but was a day after *tres Trin.* A writ of error was brought, *Et per Cur.*,

Court takes judicial notice of computation of time. Vide 6 Mod. 41, 81, 148, 160, 252, &c. 1 Leon. 242. & infra. Mod. Cases 159. S. C. 2 Keb. 59. 1 Jon. 301. Mod. Cases 41, 81, 160, 252. Jon. 228. Cro. Eliz. 227. Cro. Car. 53. * N. 5 Rep. Gage's c. not amended, but reversed. Moor 571.

1st, A writ may be executed the day it is returnable (*b*), but not after. 2dly, The Court may take notice of this judicially, and there needs no writ of error, and no assignment of this for error on the record. So 5 *Co.* 45., * the Court took notice that the *teste* of the writ of covenant was after the return. *Vide Co. Ent.* 250. *Mo.* 571., and *Plowden*, *Fish*, and *Brocket*'s case, the Court took notice the proclamation of a fine was on a *Sunday*. 3dly, There was no difference between *moveable* and *immoveable* feasts; for the moveable calculation for *Easter* was made by the council of *Nice*, but received in *England* and made part of the kalendar, which is established by the law of *England*: Therefore, whether the feast be moveable or immoveable, or whether the computation is by the day of the month or the day of the week, *viz. die Lunæ prox. post tres*, *&c.*, as it is in judicial proceedings, we have the same law and the same rule, and the Court cannot but see and take notice of what appears to them. *Vide* 1 *Cro.* 53. 1 *Lev.* 196. 1 *Sid.* 301. *Plowd.* 265, 266. *b.* *Ro.* 524. *Dy.* 181, *pl.* 52. 21 *H.* 6. 13. *pl.* 4. 3 *Cro.* 227. *Lat.* 118. 2 *Cro.* 506, 548. 1 *Jon.* 301. *Stat. de Anno Bissextili.* *Harvey* versus *Broad.* The judgment was reversed (*c*).

(*b*) *R. ac.* 2 Ld. *Raym.* 1449. *Bur.* 812. 2 *Wils.* 372.

(*c*) *Vide ac. Str.* 811. *Vide Str.* 387.

9. DAVIES *v.* SALTER.

[Mich. 3 Ann. B. R.]

S. C. 6 Mod. 250, &c. 3 Salk. 246.

A WRIT of inquiry was returnable *tres septiman. Trin.*, which was *Sunday* the 13th of *June*, and the writ appeared to be executed the 14th of *June*. Judgment *pro quer.*, and error brought; and *Eyre* urged, that the Court could not take notice of the days of the month. 1 *Cro.* 275. *Yelv.* 140. 1 *Ro. Abr.* 595. *Sed non allocatur;* thus he urged, that *Sunday* ought not to be reckoned, but *Monday* in lieu of it. *Vide Br. c.* 5. 2 *Cro.* 16. 1 *Cro.* 11. *Et per Holt*, C. J. If *Sunday* happen to be the 4*to die post*, the holding of the term must of necessity go over till *Monday*. So if *Sunday* happens to be the *essoin-day:* And as to the relation of judgment, where the *essoin-day* is a *Sunday*, the judgment can only relate to the first judicial day. All *Quinden. Octab. &c.* are inclusive: Here we enter *die Lunæ, &c.*, and that is inclusive. In *C. B.* they enter *a die Lunæ, &c.*, and yet that is inclusive too: But in the principal case there is no necessity; the writ might have been executed sooner, or returned at another day.

Same point, 1 Mod. 402. 2 Danv. 294. 6 Mod. 41, 81, 160, 196.

[627]

1 Jon. 300. 1 Danv. 683. 2 Danv. 254. 6 Mod. 41, 81, 160, 196. 1 Inst. 135.

Ante 415, 625.

TRAVERSE.

1. YOUNG *v.* RUDDLE.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. 60. S. C.]

Vide Lutw. 107, 108, 1359. 2 Cro. 221. 1 Saund. 32. Raym. 467.

ASSUMPSIT and *quantum meruit:* The defendant pleaded he gave the plaintiff a beaver-hat in satisfaction of the promises, and the plaintiff accepted it in satisfaction: The plaintiff, *protestando* that he did not give it in satisfaction, traverses, that he accepted it in satisfaction; to which it was demurred. 1st, It was urged, that this could not be pleaded in satisfaction of the promises, but should have been of the damages, like *Neal's* case, *Yel.* 192. In debt upon an obligation, the defendant pleaded a load of lime given in satisfaction of the obligation, and it was held no plea; for it ought to be pleaded in bar of the money due by the condition. *Sed per Cur.* A release of the condition would have been no bar to debt on the obligation; but a release of the promise in the case at bar had

Assumpsit, satisfaction pleaded; issue taken upon the acceptance, good. 5 Mod. 86. S. C. called Young v. Rudd. Carth. S. C. 347., called Young v. Rudd. 5 Rep. Pannell's case. Mo. 677, 678. Sty. 239. 9 Co. 39. Cro. El. 68, 193. Comb. 346. Cases B. R. 85.

Vide Str. 23. 1 Wils. 338.

been a good plea. 2dly, It was urged, that this traverse was naught; for if the gift in satisfaction be admitted, his acceptance will not be material. *Et per Holt*, C. J. The acceptance is material as well as the gift; to plead a gift without shewing the other received it would be naught (*a*); [628] either is traversable. *Vide Hob.* 178. *Et per Rokeby*, J. The gift is neither admitted nor confessed in this case by the plaintiff, because there is a *protestando* to the gift; so that it doth not appear here was any receipt at all.

(*a*) *R. ac. Str.* 573.

2. PULLEN *v.* BENSON.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 349. S. C.]

Non antea held no traverse where further matter must be disclosed before he can conclude to the country. Cro. El. 439, 443. 1 Leon. 95. Cas 123. S. C. Cases B.R. 264. Holt 558.

IN *debt on a bond*, the plaintiff declared, *quod def.* 20 *die Novembr. concessit se teneri*, *&c.*, *& proferit in cur. scriptum prædict. geren. dat. eisdem die & anno.* Defendant pleads, that it was first delivered 30 *die Novembr. & non antea*, and shews the writ, on which he was in custody, was returnable *quinden. Martini*, so that the bond was taken after the return of the writ; and then relies on the statute of *H.* 6. The plaintiff demurred and had judgment; and the Court agreed, that mere matter of supposal is not traversable, no more is matter alleged out of due time, no more is matter immaterially alleged: But they held the 20th day of *November* an express allegation; and that the defendant's plea had made it material; for the validity of the bond turned wholly upon the day of the delivery; upon which reason the defendant should have traversed its delivery on the 20th (*a*). And the Court held the *non antea* was no traverse, because it is that which cannot be rested upon; but the party must disclose farther matter before he comes to conclude. Cited *Yelv.* 138. 2 *Cro.* 263. 5 *H.* 7. 26. 2 *Keb.* 108. 1 *Sid.* 300. *Yelv.* 31. But *Holt*, C. J. said, that the case of *H.* 7. came not up to this case.

Com. Pleader, G. 12, 13.

Vide Saund. 22.

(*a*) *Vide Kel.* 229. *Beverly* v. *Pim*, 7 *Mod.* 16. *Benjamin* v. *Howell*, 1 *Wils.* 81. 20 *Vin.* 342. 4 *Bac. Ab.* 79.

2 Mod. 68.

3. CHANCE *v.* WEEDEN.

[Mich. 13 Will. 3. B. R. 1 Ld. Raym. 700. named Chauncey v. Winde.]

De injuria sua propria is a good replication to a justification by

TRESPASS for 200 bushels of salt: The defendant sets forth the act for laying a duty on salt 10 *W.* 3., that it was put on board to be exported, not being weighed,

&c.; that he was an officer, &c., and seised it; the plaintiff replied *de injuria sua propria absq. tali causa;* the defendant demurred. *Et per Holt*, C. J. Where the defendant justifies by virtue of an authority by the common law, as a constable by arrest for breaking of the peace, under process of the admiralty, &c., *de injuria sua propria* is a good replication; so it is, and by the same reason, when one justifies by an authority of an act of parliament; for being a general law, the statute can be no part of the issue. *Vide* 16 *H.* 7. 2. 2 *H.* 7. 6. *Co. Ent.* 643. A justification upon the statute *de malifactoribus in parcis*, and a like replication: As for the case in *Crogat's* case of waste, and enter *pur view*, *Holt*, C. J. said it stood on a particular reason. Also the Court held the plea ill, because it was not shewed what sort of salt this was, bay-salt, pit-salt, white-salt, &c., for the statute does not extend to all. Judgment *pro quer.*

the common law or general statute. Vide 1 Lev. 307, 308. 3 Lev. 48. 8 Co. 67. a. Com. Pleader, F. 18. 2 Lev. 11, 12. 3 Lev. 41. S. C. Holt 409. Cases B. R. 580. Vide 4 Leon. 16.

[629]

4. HAYWOOD *v.* DAVIES & AL.

[Mich. 1 Ann. B. R. Vide *this case, title* Abatement, pl. 10. pag. 4. (*a*)].

WHERE a traverse ought to conclude to the country, and where with an averment.

(*a*) To the authorities there referred to add *Hedges* v. *Sandon*, 2 *T. R.* 432.

5. WHITE *v.* BODINAM.

[Pasch. 3 Ann. B. R.]

LESSEE for years brings covenant against the lessor, declaring upon a demise and covenant for quiet enjoyment, and assigns for breach, that the lessor did enter upon him and oust him of the premises. The defendant pleads, that he entered to distrain for rent-arrear, *absque hoc*, that he ousted him *de præmisses*. To which the plaintiff demurred, thinking the traverse ill; because if he ousted him of any part of the premises, he had a good cause of action, therefore he should have traversed, *absq. hoc*, that he ousted him of the premises, or of any part thereof (*b*). But *per Cur.* The plea is well enough in this case; for if the plaintiff will join issue upon the matter of the traverse, and prove the ouster of any part, the issue shall be for him: And the Court took a diversity between

Absque hoc, that he ousted him de præmissis, goes to every part. Vide 2 Mod. 68. 3 Lev. 113, 227. 2 Co. 1. 8 Co. 91. Vaugh. 175. 3 Cro. 914. 2 Saund. 177. 1 Inst. 282. Yelv. 30. 1 Lutw. 317. Hob. 53. 1 Vent. 272. S. C. 6 Mod. 150.

(*b*) *Vide Colborne* v. *Stockdale*, *Str.* 694. 8 *Mod.* 58.

pleading the general issue, as in debt, you must plead *non debet nec aliquam inde parcellam* and a special issue, as this is. 3 *Cro.* 83, 84. *Dyer* 115. Judgment for the defendant.

Lutw. 1624, 1625. Quar. 6 Co. 24.

6. GILBERT *v.* PARKER.

[Pasch. 3 Ann. B. R.]

Upon pleading a seisin generally, traverse may be taken that he is sole seised. Vide ante 562. 5 Mod. 150. Cro. El. 372, 785. 2 Saund. 295. 9 Co. 66, 112. Mod. Cas. 158. S. C.

IN *replevin* for taking cattle, the defendant made conusance, that *A.* his master was seised of the *locus in quo*, and *per ejus præcept.* he took them damage-feasant. Plaintiff replied, that he was seised of one third part, and put in his cattle, *absq. hoc*, that the said *A.* was sole seised. To this the defendant demurred, and judgment was given against him; for the defendant makes a conusance under his master as sole seised, when he was only tenant in common; in which case he should have pleaded according to the truth, that he was only tenant in common, *&c.* When the defendant pleads his master was seised in fee of the place *where*, *&c.*, that must necessarily be understood that he is sole seised; and whatever is necessarily understood, intended, and implied, is traversable as much as if it were expressed; add therefore, though a seisin in fee is only alleged generally, yet that being intended a sole seisin. the plaintiff may traverse, *absque hoc*, that he is sole seised; since the plaintiff makes himself tenant in common with the defendant, it had not been enough to say, that he is tenant in common, without traversing the sole seisin.

2 Mod. 60. Yelv. 140.

[630]

8 Co. 89. Lutw. 1177, 1316. Ante 580, 583. 3 Lev. 104.

2dly, The court held he might either traverse, *absq. hoc*, that he was sole seised, or that he was seised *modo & forma*. *Hob.* 119. 3 *Cro.* 795. *Winch.* 7. 2 *Mod.* 6. *Dyer* 280., of which the court doubted, but said there might be difference between parceners and tenants in common who are seised *per my & per tout*. *Vide* 1 *E.* 4. 9. 2 *Vent.* 228. *Hutt.* 120. *Hob.* 72. *Mo.* 863. 37 *H.* 6. 31. *Kel.* 27. 1 *Leon.* 78. 32 *H.* 6. 2, 6. 21 *E.* 4. 65.

TREASON.

See 1 Hawk. P. C. cap. 17. Hale's P. C. 10, 11, &c. Kely. Rep. 2, 3, 4, &c.

1. REX & REGINA v. GEARY.

[Mich. 1 W. & M. B. R.]

Attainder of treason reversed for want of an allocatus before judgment. Vide ante 576. S. C. 1 Show. 131.

GEARY was attainted of high treason on an indictment, to which he pleaded guilty. Upon a writ of error brought to reverse this attainder, the exception taken was, that it did not appear he was asked what he had to say why judgment should not be given against him; and all the precedents are with an *allocutus quid*, or *si quid pro se dicere habeat, &c. Vide Plowd.* 387. *Co. Ent.* 532. *Rast.* 455. And the Court held the exception good, for he might have matter to move in arrest of judgment, or a pardon; and the attainder was reversed.

2. TUCKER'S *CASE.*

S. C. Show. P. C. 186. & vide ib. 127. & post. 632.

[Pasch. 5 & 6 W. & M. B. R. 1 Ld. Raym. 1. S. C.]

Judgment in treason reversed for want of the words contra ligeantiæ suæ debitum in the indictment. 5 Lev. 396. 4 Mod. 162. Comb. 257. Skin. 338, 360, 425, 442. Carth. 317. Cases B. R. 51. Holt 678. 3 Lev. 396. 4 Mod. 162.

REGINALD Tucker brought a writ of error to reverse an attainder of high treason, upon an indictment against him for the rebellion in *Monmouth's* time. The indictment was, that the defendant and another, *ligeantiæ suæ* * *debitum minime ponderan.*, did traitorously wage war against the king *verum & naturalem dominum suum contra pacem, &c.* It was held, 1st, That the want of the words, *contra ligeantiæ suæ debitum*, supposing them to be necessary, were not supplied by the first words, *legiantiæ suæ debitum minime ponderan., &c.*, for a man may not consider his duty, and yet may not act or offend against it: And *contra ligeum supremum dominum suum*, are not now necessary, nor were they anciently used. These do not positively express, but imply only, that the defendant acted against his allegiance; and indictments shall not be made good by intendments.

[* 631]

Post. 633. 3 Inst. 11. Hob. 271. Co. Lit. 129. Calvin's Case 6, 7. Carth. 317. Indictments not

2dly, Without the duty of allegiance there can be no treason, therefore an alien enemy cannot commit treason (*a*); an alien *amy* being here may: That for want

(*a*) This seems to be not perfectly correct; for though aliens invading this kingdom are not guilty of treason, the subjects (who reside within this realm) of a prince or state at enmity with *Great Britain* are punishable as traitors for any act within the realm which would be treason in a natural-born subject. *Vide* 1 *Hawk.* ch. 17. s. 5. *Foster* 185.

to be supplied by intendment. See 2 Hawk. P. C. 224 to 256. what certainty necessary in indictments. Dyer 155. 1 Inst. 129. 3 Inst. 11. Vide 2 Hawk. P. C. 252.

therefore of these words, the crime wants a due description.

It is true, some precedents of indictments want the words *contra ligeantiæ suæ debitum*. But to these the Chief Justice said, they were cases of treason made by particular acts of parliament, and not where the fact was treason in its nature; and that in such case it was sufficient if the indictment pursued the words of the statute, and concluded *contra formam statuti*, without concluding *contra ligeantiæ suæ debitum*. The attainder was reversed (*a*).

(*a*) This judgment of reversal was affirmed in Parliament. 1 Ld. *Raym*. 2. *Show*. *P. C.* 186, 7.

Vide 1 Hawk. P. C. cap. 17. sec. 32, 33, 34.

3. CHARNOCK'S *CASE*.

[7 Will. 3. *At the* Old-Bailey.]

Words of persuasion or consultation, an overt act of treason in compassing the king's death. Vide Cro. Car. 125 & 332, 333. S. C. Ante 288. 3 Salk. 81. Holt 133, 301, 681. Foster 200. 1 Hale 111, 323. 1 Bl. Rep. 37.

THE question was at the trial, Whether words could be an overt act of treason in compassing the death of the king? For *Hale*, *Placit*. *Coran*. 13. says, Words are not an overt act of treason, unless set down in writing. *Et per Holt*, C. J. Loose words spoken without relation to any act or project, are not treason: But words of persuasion to kill the king are overt acts of high treason; so is a consulting how to kill the king; so if two men agree together to kill the king; for the bare imagination and compassing makes the treason, and any external act that is a sufficient manifestation of that compassing and imagining, is an overt act: It was never yet doubted, but to meet and consult how to kill the king, was an overt act of high treason. *Vide Cro. Car*. 117.

[632]
S. C. Parl. Cas. 127, &c.

4. DOMINUS REX *v*. WALCOT.

[Trin. 7 Will. 3. B. R.]

Judgment in treason reversed for want of the words ipso vivente, or in conspectu ejus, as to burning the bowels. Vide Parl. Cas. 127, &c. & 186, &c. Ante 630. 3 Lev. 396. 4 Mod. 162, 395. Carth. 348. S. C.

WRIT of error to reverse a judgment against the defendant in an indictment of high treason: The judgment was, *quod interiora extra ventrem trahentur;* but these words, *in conspectu ejus & ipso vivente comburentur*, were omitted: It was agreed, that if this be a necessary part of the judgment and omitted, the judgment is erroneous; for the judgment, in capital cases especially, is stated, and not arbitrary; and it was held that this was a necessary part; for though death is the *ultimum supplicium*, yet death inflicted one way is more severe than another, and more formidable; and if this judgment be right, all

other judgments are wrong, for all others have these words, *viz. In conspectu, &c. Vide* 1 *H.* 7. 24. *Br. Coron.* 121. *Stow's Annals* 513. *Plowd.* 387. *Rast.* 545. *Staund.* 128. *Co. Ent.* 422, 423. *Harrison*, one of the regicides, rose up and struck his executioner after his bowels were cut out, which shews the thing is not impossible, though that be not very material. At another day it was insisted, that the record below was right on an affidavit, that swore, that the words *ipso vivente* were in the record below, and therefore it was prayed, that the clerk of the peace might attend by rule, which was granted; and upon his attendance it appeared upon examination, that the minutes of the judgment taken and entered upon the record of the indictment had these words in; but Mr. *Turner*, clerk of the peace, said, that Sir *Robert Sawyer*, then attorney-general, after the trial said, that use was to be made of the record in *Ireland*, and therefore examined it before it was transcribed, and then this record, which is now certified, was entered at large; so that the question was, Which was the record? *Et per Cur.* That which was entered at large is the record. Then the counsel moved it might be amended by the minutes: And *Holt*, C. J. said, that if it were amendable, they could not amend it here; for if a record in *C. B.* be erroneous, we cannot amend it here; but upon diminution alleged here, we grant a *certiorari;* but there can be no diminution alleged at the *Old Bailey*.

Staund. 182. 3 Inst. 211. Comb. 369. Cases B. R. 95. Holt 680. 3 S. T. 600. 6 S. T. Ap. 42. Skin. 442. 2 Hawk. c. 48. s. 3. and note to 6th ed. thereof.

Record of judgment in treason refused to be amended by the minutes of the Court of Old Bailey. Vide 2 Hawk. P. C. 247.

2dly, He questioned much if it were at all amendable, and cited *Sampson's* case, *Jones* 421., where the Court were divided; and it is there said by *Kelynge*, that there were no precedents of any such amendments. And after the case had been argued several times at the bar, upon the matter in law, the Court, *Trin.* 8 *W.* 3., unanimously, upon solemn arguments, reversed the attainder, for want of the words *ipso vivente*, or *in conspectu ejus*.

Bur. 2527.

5. CRANBURN'S *CASE*. [633]

[Pasch. 8 Will. 3. B. R.]

CRANBURN, a natural-born subject of *England*, was indicted of high treason *contra ligeantiæ suæ debitum*. It was objected, that it ought to be *naturalis ligeantiæ suæ debitum*, or *contra supremum naturalem dominum suum*, to distinguish it from that which is local allegiance; for there are two sorts of allegiance; a natural allegiance, as that of subjects; and a local allegiance, as that of strangers residing here; and this is the allegiance in the indictment mentioned. *Sed per Cur.* If an alien be indicted for trea-

Subject indicted for treason contra ligeantiæ suæ debitum, well; otherwise if naturalized, &c. in the case of an alien. Ante 631. 3 Inst. 5, 11. Hob. 271. Co. Lit. 129. S. C.

Holt 686. 4 S. T. 686. 6 S. T. Ap. 56.

son *contra naturalem dominum suum*, or *naturalis ligeantiæ suæ debitum*, the defendant may give in evidence that he is an alien; for the indictment is restrained to that species of allegiance which is not due; but a subject may be indicted so, or *contra ligeantiæ suæ debitum;* for allegiance is the *genus*, which being set forth, all species are comprised under it.

In indictments for compassing the king's death, the treason being first laid, the overt act need not be laid proditorie. See 1 Hawk. P. C. 38, 39, &c.

The indictment was, that such a time and place *proditorie tractaverunt proposuerunt & consultaverunt de viis & modis quomodo dominum regem interficerent & consenserunt & agreeverunt quod quadragint. homines equestres* should be provided, *&c.*, for that end.

It was objected, that here are two distinct acts of high treason, and the latter is not laid to be done *proditorie*. *Sed non allocatur;* for, by Mr. *Cowper*, the *et* makes the whole but as one sentence; at least it conveys the force of the words in the former sentence to this, and makes it partake of them. *Et per Holt*, C. J. Here is but one treason alleged, *viz.* compassing the death of the king, and that is said to be *proditorie;* therefore it need not be repeated again in setting forth the overt act; for the overt act is not the treason, but evidence of the treason. The treason itself lies in compassing, which is an act of the mind. Accordingly in the case of the regicides it was agreed, that the indictment should not be for killing the king, but for compassing and imagining his death, and that the killing should be alleged as the overt act; for by the statute the treason consists in the intention. But if a distinct treason, as that of levying war, had been alleged, where the treason consists in the act and not in the intention, the act must have been said to be done *proditorie;* for the act of levying is a treason, and not an overt act of treason or bare matter of evidence.

Otherwise where the treason consists in the act.

[634]

6. COOK'S *CASE*.

[8 Will. 3. *At the* Old Bailey.]

Copy of indictment not granted after pleading.

IN the indictment against *Cook*, after the Court was sat and the jury called, but not sworn, Sir *Bartholomew Shower* of counsel for the prisoner made objections to the indictment, but it was held right enough; upon that he urged, that then he had not had a copy, and the prisoner could not be tried. *Et per Cur.* By the words of the act he is to demand it, and he has it to enable him to plead, and till then he is not to plead. In this case he has pleaded; therefore this benefit is waived, and the prisoner has admitted he has a copy, or did not think it for his service

to require it, but was able to plead without the help of it (*a*).

(*a*) By stat. 7 *Ann.* c. 21. the party indicted shall have a copy of the indictment, and a list of all the witnesses to be produced, and the jurors impannelled, delivered to him ten days before the trial.

7. VAUGHAN'S *CASE.*

THE defendant was indicted for treason, in adhering to the king's enemies, *cum pluribus subditis Gallicis inimicis domini regis*, and that they did navigate a certain vessel called *Clancarty*, with a design to destroy the king's ships. And it was held by *Holt*, C. J. and the other justices at the trial, that an indictment for levying war, or adhering to the king's enemies generally, without shewing particular acts or instances, is not good; for the words of the statute are, *and thereof be provably attainted by some overt deed*, which comes after the particulars of compassing the king's death, levying war, and adhering to the king's enemies; and it would be violence to restrain them to the first article only without regard to the last, to which they are equally connected; if they are to be restrained to a single article, it ought rather to be referred to the article of adhering only.

Indictment for treason in levying war, or adhering to the king's enemies generally, without shewing particular instances, not good. Vide 1 Hawk. P. C. 37, 38. S. C. Holt 689. 5 S. T. 17. 6 S. T. Ap. 57.

And if it be not a good indictment without special acts, *&c.*, the question is, Whether those that are alleged ought not to be proved, and no others? *Et per Holt*, C. J. A distinct overt act cannot be given in evidence, unless it relate to that which is alleged, or conduces to the proof of it. But if it conduce to prove an overt act alleged, it is good evidence; as if consulting to kill the king be alleged, any actings or doings in pursuance of that consultation may be proved; for it proves their agreement and consent, and is a farther manifestation of the act alleged in the indictment.

Foster 245.

It was also objected, that in evidence the seamen must appear to be *Frenchmen* born; for if they were *Dutch*, they are not *subditi Gallici*.

2dly, That though he was said to adhere to the king's enemies, yet it was not said to be against the king. [635]

3dly, That this was not a sufficient act of adhering, without fighting, or some act of hostility. *Et per Cur.*

1st, If the *States* be in alliance, and the *French* at war with us, and certain *Dutchmen* turn rebels to the *States*, and fight under command of the *French* king, they are *inimici* to us, and *Gallici subditi;* For the *French* subjection makes them *French* subjects in respect of all other nations but their own; and if such cruise at sea, and an *English*-

Joining with rebels subjects of the king's ally, fighting under the command of an enemy prince, is treason in adhering, &c.

man assist them, he is a traitor, but not a pirate, for none are pirates that act under the command of a sovereign prince.

Though the fighting be directly against an ally. Vide 1 Hawk. P. C. 37, 38.

2dly, Adhering to the king's enemies must of necessity be against the king; and therefore if an *Englishman* assist the *French*, being at war with us, and fight against the king of *Spain*, who is an ally of the king of *England*, this is treason, as adhering to the king's enemies against the king; for the king's enemies are hereby strengthened and encouraged, and so is within the express words of 25 *E.* 3. of adhering to the king's enemies; and it is sufficient to allege the treason in the words of the statute.

Cruising is a sufficient overt act.

3dly, Cruising is a sufficient overt act of adhering, comforting, and aiding; as if *Englishmen* would list themselves and march, this is sufficient without coming to battle, and there may be levying war without actual fighting. *Vide Vaughan's trial.*

See Raym. 367. *That an indictment for high treason may be tried by nisi prius.*

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[636]

TRESPASS.

1. INCLEDON *v.* BURGESS.

[Mich. 1 W. & M. B. R. Intr. Mich. 4 Jac. 2. Rot. 282.]

Contra pacem is substance. Vide post. 641. Cro. Jac. 527. 1 Hawk. 244. 2 Hawk. 243. 6 Mod. 128. 4 Mod. 145. 1 Salk. 67. Yelv. 66. Vide 1 Sid. 253. 2 Cro. 377. 2 Vent. 49. Show. 27. Comber. 166. S. C. Carth. 65. S. C. Holt 342. 4 & 5 Ann. c. 16. must be taken advantage of on special demurrer.

TRESPASS for breaking, entering, and depasturing, 36 *Car.* 2., *continuando* the depasturing till 4 *Jac.* 2., *contra pacem domini regis nunc*, which was K. *James* the Second. This was held naught, for then there is no *contra pacem* to the trespass *tempore Caroli Secundi*, but it is omitted, and *contra pacem* is substance. *Vide Cro. Car.* 325. *Cro. Jac.* 426, 443, 537.

2. HORE *v.* CHAPMAN.

[. . . . 1 Will. & M. B. R.]

Declaration in trespass, Quare vi & armis, &c. ill. See 2 Lev.

IN trespass the plaintiff declared, *quare vi & armis clausum fregit*, and, after verdict for the plaintiff, judgment was arrested, for *quare* is not positive but interroga-

tory, and much worse than *quod cum. Vide* 1 *Cro.* 420. 2 *Cro.* 47. 2 *Bulst.* 214. *Godb.* 251. 2 *Keb.* 400. 1 *Sid.* 326. 3 *Cro.* 57. 1 *Keb.* 377.

206. 2 Jon. 197. 2 Show. Cas. 17, 180, 294. Con. 413. 1 Wilson 99. 2 Wilson 203. Contra.

3. WILDGOOSE *v.* KELLAWAY.

[Trin. 3 W. & M. B. R. Rot. 268.]

Declaration in trespass without vi & armis, ill on a general demurrer. Vide 1 Hawk. 145, 149, 150. 2 Hawk. 241, 242.

TRESPASS for breaking his house and taking away his dishes; the defendant justified under a by-law, but that being ill, the plaintiff demurred; but the defendant took exception to the declaration, because it wanted the words *vi & armis;* and the Court held it naught on a general demurrer (*a*), being an omission of the substance; for it alters the judgment from a *capiatur* to a *misericordia. Item,* It belongs to the jurisdiction of the county court, if it be a trespass without *vi & armis.*

(*a*) By stat. 4 and 5 *Ann. c.* 16. it is aided on a general demurrer.

4. SMITH *v.* KEMP.

[637]

[Trin. 4 W. & M. B. R.]

S. C. 4 Mod. 186. Skin. 342. Holt 322.

Trespass lies for fishing in libera piscaria, and taking his fish. Comber. 11, 433, 464. 4 Mod. 186. Carth. 285. S. C. H. who hath free warren, may bring trespass against any but the owner of the soil, for hunting there. 6 Mod. 183. 2 Keb. 178. 3 Mod. 97. 1 Mod. 105.

TRESPASS *vi & armis*, for taking fishes *ex libera piscaria sua.* Upon not guilty pleaded, and verdict for the plaintiff, it was moved in arrest of judgment by *Carthew*, that he that had *libera piscaria*, could not maintain trespass; and compared it to the case of a commoner who could not bring trespass for a trespass done in the common: That *libera piscaria* was not like *libera warrena*, for he did allow that he who had *libera warrena* might have trespass against any one but the owner of the soil, for hunting in his free warren. 2 *Ro.* 111, 550., because *libera warrena* was a liberty to hunt in one's own or another's ground, exclusive of all others; and that this was granted by the king, who is master of all games: But *libera piscaria* was only a freedom of fishing with others, and the same with *communis piscaria*, and for this he cited 1 *Inst.* 122., and that such a grantee had only a liberty to take fish, and no property in them until taken; and so prayed that judgment might be arrested.

Vide Dav. Rep. 159. 1 Salk. 137.

Holt, C. J. cited and relied upon the *Reg.* 95. in point, where there is the same writ, and likewise in *F. N. B.* 15. *G. H.* 43 *E.* 3. 11, 6., and said there were three sorts of fisheries. 1. *Separalis piscaria*, and there, he who had the fishery was owner of the soil, and therefore it is a good

H. having libera piscaria hath property in the fish, and Co. Lit. 122, denied. Vide ante 556. 11 Co. 17, &c. Cro. Car. 553, 554.

plea in an action brought by him, that it is *liberum tenementum* of another. 2dly, *Libera piscaria*, which is where the right of fishing is granted to the grantee, and such a grantee hath a property in the fish, and may bring a possessory action for them, without making any title. 3dly, *Communis piscaria*, and this was to be resembled to the case of other common; and disallowed the authority of 1 *Inst.* 122. (*a*) *Eyre*, Justice, said, that he took 1 *Inst.* 122. to be law, and that many judgments and precedents were founded upon that case, and that *libera ex vi termini* did imply common, which the Chief Justice and *Dolben* denied in defence of the Register. *Et noto dict. fuit per Carthew* in this case, that there were several writs there against law, particularly *R.* 105., trespass *per* baron and feme for assaulting the wife, and taking the goods of the husband.

(*a*) The passage 1 Inst. 122. relative to this subject is as follows: "A man may prescribe to have *seperalem piscariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communiam piscariæ*, or *liberam piscariam*, the owner of the soil shall fish there." In 2 *Bl. Com.* 39. it is stated, agreeably to the opinion of *Holt*, that ownership of the soil is essential to a several fishery; but in *Seymour* v. Ld. *Courtenay*, 5 *Bur.* 2814. the Court declined giving any opinion upon the point. In *Kunersley* v. *Orpe*, *Doug.* 56 it is mentioned as a point which seems still not quite settled. Mr. *Hargrave*, in a note to the above passage, in 1 *Inst.* observes, "We do not understand why a several fishery should not exist without the soil, as well as a several pasture." And, having examined the authorities in support of the contrary position, he says, "The arguments, as it should seem, are short of the purpose, for at the utmost they only prove, that a several fishery is presumed to comprehend the soil, till the contrary appears, which is perfectly consistent with Ld. *Coke*'s position, that they may be in different persons; and indeed appears the true doctrine upon the subject." In *Seymour* v. Lord *Courtenay*, it was ruled, that a grant of fishery, with the exception of oysters, and a reservation of a right to take fish for the grantor's own title, constituted a several fishery, no other person having a co-extensive right with the grantee. It was held, that it *could* not be a free fishery, because no person had a co-extensive right.

5. GIBBON *v.* PEPPER.

[Pasch. 7 Will. 3. B. R. 1 Ld. Raym. 38. S. C.]

Justification must confess the trespass. S. C. 4 Mod. 404. 2 Lev. 179. 4 Mod. 404. S. C. Styl. 72. 1 Vent. 295. 2 Jo. 205.

IN trespass and assault, &c., the defendant pleaded that he was riding a horse in the king's highway, and that his horse being frightened ran away with him, and that the plaintiff * and others were called to, to go out of the way, and did not; and the horse ran upon the plaintiff against his will, &c. The plaintiff demurred, and had judgment; not but if the defendant had pleaded not

[* 638]

guilty, this matter might have acquitted him upon evidence; but the reason of their judgment was, because the defendant justified a trespass, and does not confess it; for if *A.* beats my horse, by which he runs on another, *A.* is the trespasser, and the rider is not. And as to *Hob.* 134. *Mo.* 864. *placito* 1192. 1 *Brownl. Precedents* 188. they differ, for in them a battery is confessed.

3 Lev. 37. 1 Saund. 3. Hob. 134. Rol. Abr. 548. Style 72.

Vide 3 Wils. 411.

6. ASHMEAD *v.* RANGER.

[Trin. 11 Will. 3. B. R. 1 Ld. Raym. 251. S. C. Comyns 71. S. C.]

TRESPASS was brought by lessee of a copyholder for life, for breaking his close, and cutting down his trees; the defendant justified as servant to the Earl of *Kent*, lord of the manor. The plaintiff replied, that the copyholder was tenant for life, his house in decay, and that the trees growing on the land were not sufficient to repair, *&c.* Upon demurrer, *Holt*, C. J. held, that 3 *Cro.* 5. was not law, and that the copyholder was tenant of the trees as much as of the land; that the fruit and the acorns belonged to the tenant; and he held, that if *H.* has all the thorns in such a place for estovers, he may maintain trespass against any one that cuts them, even his grantor, and in such case need not aver that he burnt them. But where *H.* hath only estovers to be taken in such a wood or place, and the grantor cuts the whole, the grantee may maintain case against the grantor, but not trespass *vi & armis;* and the whole Court held the action was well maintained by the possessory right which the plaintiff had: The judgment was affirmed in *Cam. Scacc.* but reversed in the House of Lords; for the tenant could not cut the trees; and if the lord could not, they must rot on the land; for then nobody could.

Trespass by lessee of a copyholder for life, for cutting down by the lord of the manor, held maintainable in B.R. and affirmed in Cam. Scac. but reversed by the Lords. S. C. Cases B. R. 378. Holt 162. Fort. 152. S. C. Vide 1 Leon. 272.

7. MONKTON *v.* PASHLEY.

S. C. 6 Mod 38. Holt 697.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 974. S. C.]

TRESPASS for entering his close and hunting such a day *continuando transgr. præd. quoad* the hunting, *diversis diebus & vicibus*, from the day of the trespass alleged till such a day. *Salkeld* urged that this appeared not to be continued; that some acts were permanent without intermission or repetition, which properly lie in continuance, others not.

Trespass for entering his close and hunting, laid with a continuando, and held well. Vide post. pl. 8. 2 Mod. 253. 2 Salk. 359.

5 Mod. 178. 1 Sid. 319. 6 Mod. 39. 1 Lev. 210. 1 Vent. 363, 224, 249. 2 Rol. Abr. 549. 2 Mod. 253. Yelv. 126. Raym. 396. Cro. Eliz. 182.

2dly, That some acts terminate in themselves and cannot be repeated, as killing a dog, when once done it cannot be done again; therefore this cannot be laid with a *continuando*. *Vide* 1 *Lev*. 210. 2 *Ro*. *Abr*. 549. And as to repeatable acts, wherever the first trespass is without an ouster, there every several entry is a distinct trespass and a new trespass and not a continuance of the first; for a release of the first would not discharge the second. *Vide Cro. Jac*. 107. *Yelv*. 126. [which *Holt*, *C*. J. denied; for the continuance must be answered as well as the first act.] But where the first entry is with an ouster, there every other act or entry during the ouster is but a continuance of the first trespass, and a release of the first discharges all. *Vide* 1 *Brownl*. 223. *Cro*. *El*. 210. 1 *Lev*. 210. compared with 1 *Sid*. 319., and so is *F*. *N*. *B*. 91. *b*. to be intended. So is 20 *H*. 7. 3. 2 *Ric*. 3. 15. 21 *H*. 8. 43.

Acts that being once done cannot be repeated, cannot be laid with a continuando. Comb. 193, 377, 427, 433. Faresl. 152. 5 Mod. 178.

Holt, C. J. held, that of acts that terminate in themselves, and once done, cannot be done again, there can be no *continuando*, as hunting and killing a hare or five hares, but that ought to be alleged, that *diversis diebus & vicibus inter* such a day and such a day, he killed five hares, or cut and carried twenty trees: And where a trespass is laid in continuance, that cannot be continued, exception ought to be taken at the trial, for he ought to recover but for one trespass. The Court held, that hunting might be continued as well as spoiling and consuming his grass, or cutting his grass; and as to the case of an entry and ouster the Court held, that the plaintiff being ousted and having made a re-entry, might bring trespass, and declare that he entered such a day, *continuando*, *&c*., or that he entered such a day, *& diversis diebus & vicibus* between such a day and such a day. And the plaintiff had judgment.

Cowp. 828. 1 Ld. Raym. 239.

Comb. 426, 427.

8. BROOK *v*. BISHOPP.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 823. S. C.]

Trespass in cutting down such a number of trees cannot be continued; but a general continuando shall be applied to what may be continued after verdict. Vide ante, pl. 7. Faresl. 152. 1 Ld. Raym. 233. Skin. 42. 2 Sho. 196.

TRESPASS *quare vi & armis* the defendant, on the 2d of *April*, broke and entered his close; and trod down his grass, *nec non arbores suas*, *viz*. 10 *populos & suboscum suum*, *viz*. 10 *carectatus subbosci succidit cepit & asportavit*. *transgressiones præd*. *usq;* 27 *Aprilis diversis diebus & vicibus continuando;* and after verdict and entire damages, it was resolved, 1st, That the continuance, as to the poplars and underwoods, was impossible, and could not be.

2dly, That no part of the damages shall be intended to be given for that, but shall be applied to such trespasses as

may be continued, according to 1 *Vent.* 363., *continuando transg. præd.* generally, shall only refer to so much as lies in continuance; but if it be *continuando* such and such particulars, and they lie not in continuance, it is naught after verdict. T. Jon. 194. Cowp. 828.

9. JOCE *v.* MILLS. [640]

[Trin. 2 Ann. B. R. 2 Ld. Raym. 890. S. C.] S. C. 6 Mod. 14.

TRESPASS *quare clausum suum apud D. fregit & duos equos apud D. præd. in clauso præd. invent. existen. et centum congios tritici de bonis propriis ipsius adtunc & ibidem similit. invent. & existen. cepit & asportavit, &c.* The defendant pleaded not guilty to all but the two horses, and as to them a distress for rent; upon which it was demurred, the issue being found for the plaintiff, and contingent damages entirely given on the demurrer: And now the plea being held an ill plea, Mr. *Branthwayte* moved in arrest of judgment, that the horses were not laid to be the goods of the plaintiff; for that it did not follow that they were the plaintiff's horses, because found on the plaintiff's close. *Vide* 2 *Cro.* 46. *Yelv.* 36. *equum cepit a persona sua.* 2 *Lev.* 156, 430. 3 *Bulst.* 303. *quod fuit concess. per Cur.*

Trespass quare duos equos apud D. in clauso præd. invent. existen. & triticum de bonis propriis ipsius A. &c. cepit, does not shew the property of the horses. Vide ac. 1 Ld. Raym. 239. Yelv. 36. Bl. 980. 1 T. R. 480.

2dly, It was urged and admitted, that the plea did not confess a property; for the defendant might distrain the goods of a stranger for the rent. Plea of taking by distress for rent does not confess property.

3dly, It was held, that the copulative *et* did not let it into the subsequent part of the other sentence, so as to make the horses come under the *de bonis propriis*, like the case in *Raymond* 395. Trespass for taking a mare *ipsius quer. nec non bona & catulla sequent.*, nor 2 *Saund.* 379., which cases were allowed; and the reason is, because they are different sentences, and the first is closed up by the place being added: Yet *Gould*, J. agreed the case in 2 *Ro.* 250. *placito* 7.; for there, by virtue of the copulative, the *ipsius querentis* goes to all.

4thly, It was held the plaintiff could have no judgment, because the conditional damages were entire, *secus* if several. Vide 3 T. R. 435.

10. RUSSEL *v.* COMB. S.C. 1 Salk. 119. Vide post. 642.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 1031. S. C.]

WHERE matter may be laid as aggravation of trespass, for which alone trespass lies not, *vide* this case, title *Baron and Feme*, *pl.* 12. *pag.* 119. 2 Cro. 123. Mod. Cas. 127, 145.

11. DAY v. MUSKETT.

S. C. 6 Mod. 80.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 985. S. C.]

Trespass laid in a former king's time, contra pacem of the present, ill on demurrer, but cured by verdict.

[* 641]

Cro. Jac. 527. Yelv. 66. Vide ante 636. 1 Hawk. 244. 2 Hawk. 243. 1 Sid. 253. Carth. 65. Comb. 166. 4 & 5 Ann. c.16.

TRESPASS *quare vi & armis primo die Febr. ann. dom.* 1701, *clausum suum fregit*, and concludes *contra pacem dominæ Annæ nunc reginæ, &c.* The defendant pleads, that he and another did the trespass jointly, and that the plaintiff **relaxavit* to the other. To that it was replied *non est factum;* to which it was demurred, and judgment *pro def.*, for King *William* died the 8th of *March* 1701, so it was *contra pacem regis*, and not *contra pacem reginæ;* the omission of *contra pacem* had been only matter of form, but here it is repugnant, for the Court must take notice of the demise of the king; that is the description of the trespass, and a trespass done *contra pacem regis* could not be given in evidence: Indeed a verdict would have aided it. 16 & 17 *Car.* 2.

12. GREEN v. GODDARD.

[. . . . . . Ann. B. R.]

Where in entering H.'s close, there is only force in law, H. cannot lay hands on the trespasser before request to depart; otherwise where there is actual force.

3 Salk. 308. 6 Mod. 227, 260. 2 Vent. 75. 1 Saund. 35.

TRESPASS, assault, and battery laid on the first of *October*, 3 *reg.* The defendant, as to the *vi & armis* pleaded *non cul.* And as to the residue says, that long before, *viz.* on the 13th of *September*, a stranger's bull had broke into his close, that he was driving him out to put him in the pound, and the plaintiff came into the said close, & *manu forti impedivit ipsum ac taurum præd. recussisse voluit, & quod ad præveniend. &c. ipse idem defend. parvum flagellum super querentem molliter imposuit, quod est idem residuum, &c., absque hoc quod cul. fuit ad aliquod tempus ante eundem* 13 *diem.* The plaintiff demurred. Mr. *Eyre* for the plaintiff argued, that they should have requested him to go out of the close. 19 *H.* 6. 31. 11 *H.* 6. 23. 2 *Ro. Tresp.* 547, 548, 549., and that *flagellum molliter imponere* is repugnant. 1 *Sid.* 4. Lastly, The traverse is short, and no answer to the time after. 1 *Leon.* 307. 3 *Cro.* 87. 1 *Ro. Rep.* 406. *Et per Cur.* There is a force *in law*, as in every trespass *quare clausum fregit:* As if one enters into my ground, in that case the owner must request him to depart before he can lay hands on him to turn him out; for every *impositio manuum* is an assault and battery, which cannot be justified upon the account of breaking the close in law, without a request. The other is an *actual force*, as in burglary, as breaking open a door or gate; and in that

2 Brownl. Ent. 260. 3 Lev. 113. Rep. B. R. Temp. Hard. 358. Com. Dig. Pleader, 3 M. 16.

case it is lawful to oppose force to force; and if one breaks down the gate, or comes into my close *vi & armis*, I need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence: So if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request.

2dly, *Powell*, J. held, that the attempt to take and rescue the bull was an assault on his person, and a taking from his person; for if *H.* is driving cattle on the highway, and one comes and takes them from him, it is robbery, which cannot be without a taking from his person; *quod non fuit negatum*. *Vide* 29 *H.* 6. 66. 2 *Ro.* 549. *placito* 11. 1 *Ro. Rep.* 70.

Taking cattle from H. is a taking from his person. 3 Inst. 69. Hale P. C. 73. Str. 1015. Rep. B. R. Temp. Hard. 113.

* 3dly, They held the *quod est idem residuum* good without a traverse, and therefore no traverse was necessary; [*Vide* 1 *Saund.* 8.] and consequently it is no matter though it be short, for here it goes only to the time; where *quod est idem* avers it to be the same. *Et per Holt*, C. J. Where a traverse goes to the matter of a plea, *&c.*, all that went before becomes inducement, and is waived by the traverse; but where a traverse goes to the time only, what was set out in the plea before does not become bare matter of inducement, nor is it waived by the traverse. *Sed adjournat.* Mr. *Eyre pro. quer.* Mr. *Brydges pro def.*

Where traverse goes to the matter, all before is inducement and waived; otherwise where to time only.

[* 642]

13. COCKCROFT *v.* SMITH.

[Pasch. 4 Ann. B. R. 1 Ld. Raym. 177. S. C. stated at the end of the case of Cook and Beal.]

IN trespass for an assault, battery, and maihem, defendant pleaded *son assault demesne*, which was admitted to be good plea in maihem. But the question was, What assault was sufficient to maintain such a plea in maihem? *Holt*, C. J. said, that *Wadham Wyndham*, J. would not allow it if it was an unequal return; but the practice had been otherwise, and was fit to be settled: That for every assault he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea was, that he struck in his own defence: That if *A.* strike *B.*, and *B.* strikes again, and they close immediately, and in the scuffle *B.* maihems *A.*, that is *son assault;* but if upon a little blow given by *A.* to *B.*, *B.* gives him a blow that maihems him, that is not *son assault demesne*. *Powell*, J. agreed; for the reason why *son assault* is a good plea in

Son assault demesne, a good plea in maihem where the first assault was violent. S. C. 6 Mod. 230, 263. Rep. A. Q. 43, 52. Holt 699.

1 Sid. 246. 1 Rol. 19. 1 Wils. 5.

maihem, is because it might be such an assault as endangered the defendant's life (*a*).

(*a*) In the principal case *Holt* directed the jury to find for the defendant. In Ld. *Raymond*, the first assault is stated to be tilting the form on which the defendant sat; in *Rep. A. Q.* (11 *Mod.*) that the plaintiff ran his finger towards the defendant's eye.—The maihem was biting off the plaintiff's finger.

14. NEWMAN *v.* SMITH & AL.

[Trin. 5 Ann. B. R.]

Trespass for entering the plaintiff's house and assaulting him. Assaulting and menacing his servants may be laid by way of aggravation. But must not make several counts of it. 6 Mod. 127. Vide ante 593, 594. 1 Salk. 119. S. C. Holt 699, 700. 2 Cro 123. Mod. Cases 127, 149.

TRESPASS *de eo quod* the defendants *tiel jour & an apud W.* upon the plaintiff *insult. fecer. & ipsum verberaver., &c. Ita quod de vita, &c., & domum ipsius quer. apud W. præd. adtunc & ibidem freger. & intraver. & quer. in quiet. usu & occupatione domus præd. disturbaver. & impedivcr. necnon in præd. quær. & filium suum & M. N. & R. N. filias præd. quer &. N. servam suam minas de verberatione eorum adtunc & ibidem imposuer. & ipsos injuriis & gravaminibus, viz. insult. & affraiis adtunc & ibidem effecer. Et alia enormia, &c.* Upon not guilty it was found for the plaintiff; and Mr. *King* moved in arrest of judgment upon 2 *Cro.* 501., that the master could not maintain trespass for beating his servant or children without special damage, which ought to be specially shewed. Mr. *Eyre* answered, and so it was resolved, that the action was for the breaking and entry, and the farther description is only to shew the Court how enormous that trespass was; and the plaintiff could not recover damages for losing the service of his children or servant, nor could that be given in evidence; because the plaintiff might have a proper action for that purpose: But the circumstances mentioned might be proved in evidence to aggravate damages for the defendant's trespass by breaking and entering. And whereas it was said, *ibidem* refers to the vill, and it should be *in domo prædict.*, it is plain the *adtunc* ties it to the same time, and then it could not be at a different place at the same point of time.

[643]

Ante 640. pl. 10. Vide ac. Str. 61. Bull. N. P. 89.

15. LAYTON *v.* GRINDALL.

[Pasch. 8 Ann. B. R.]

Trespass for entering his house and taking separal. claves pro

TRESPASS for entering the plaintiff's house and taking *separales claves pro apertione ostiorum domus præd.* Upon not guilty pleaded, the plaintiff had a verdict, and

it was objected, that the taking of each key was a distinct trespass, and might require several answers, and the kind and number ought to be ascertained. *Vide Playter's* case, 5 *Co.* 34. 1 *Vent.* 53. 2 *Vent.* 262. But to this it was answered and resolved, that the keys are sufficiently ascertained by reference to the house. *Vide Al.* 2. *Sty.* 43. 1 *Vent.* 114. 2 *Cro.* 485.

apportione ostiorum domus, &c. good without shewing number. Vide 2 Str. 167. 2 Ld. Raym. 1410. 3 Wils. 292.

16. ANONYMOUS.

[Pasch. 8 Ann. B. R.]

TRESPASS for taking his cattle. The defendant pleaded that he was possessed of a close for a term of years, and the cattle trespassed therein, *&c.* The plaintiff demurred, and judgment was given for the defendant, though he shewed no title, but justified upon a bare possession. And this difference was taken by *Holt*, C. J. Where the action is transitory, as trespass for taking goods, the plaintiff is foreclosed to pretend a right to the place; nor can it be contested upon the evidence who had the right; therefore possession is justification enough: But in trespass *quare clausum fregit* it is otherwise, because there the plaintiff claims the close, and the right may be contested.

Where the trespass is transitory the plaintiff cannot pretend a right to the place, therefore the defendant may justify by possession only. Bul. N. P. 89. 4 Mod. 419. Carth. 10. 2 Mod. 70. 3 Mod. 132.

Southby versus Eaton, Mich. 16 Geo. 2. B. R. In error same point adjudged.—Note to 5th edition.

TRIAL.

[644]

Vide 7 Co. 2, 3, 4, 7, &c. 9 Co. 30, 31, 32, &c.

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1. ANONYMOUS.

1 Mod. 55.

[Pasch. 5 W. & M. B. R.]

A CAUSE cannot be tried at bar where action is laid in *London*, by reason of their charter.

Trial at bar. Vide ante 625. post. 648, 649. Str. 854.

But nota. The great cause of Lockyer versus the East India Company was tried at bar, Mich. 2 Geo. 3. by a special jury of merchants of London, the privilege being waived, 2 *Wils.* 136.

2. SMITH v. BRAMPSTON.

[Mich. 7 Will. 3. B. R. 1 Ld. Raym. S. C. named Smith *versus* Frampton.]

New trial was denied in case for negligently keeping his fire. 5 Mod. 87. S. C. called Smith versus Crampton.

CASE for negligently keeping his fire; verdict *pro def.* Though the verdict was against evidence, a new trial was denied, because it is a hard action; yet *note;* Action against the hundred for a robbery, verdict *pro def.*, and new trial granted. 1 *Sid.* 58. (*a*)

(*a*) The principles upon which granting new trials depend, are stated very clearly in 3 *Bl. Com.* ch. 24. and in the case of *Bright* v. *Eynon*, 1 *Bur.* 390. In that case it was said by *Denison*, J. "That it would be difficult, perhaps, to fix an absolutely general rule about granting new trials, without making so many exceptions to it as might rather tend to darken than explain it; but the granting a new trial must depend upon the legal discretion of the Court, guided by the nature and circumstances of the particular case, and directed with a view to the attainment of justice." In order to induce the Courts to grant a new trial, it is not sufficient that a cause is of value or importance, but it must also involve a doubt; although value frequently weighs in granting a rule to shew cause, *Vernon* v. *Hankey*, 2 *T. R.* 113. Where complete and substantial justice has been done, a new trial will not be granted, though the judge who tried the cause may have been mistaken in point of law; as where an action was brought by a person for a violent assault on her niece, who lived with her, *per quod serv. amisit*, and the judge held that the aunt stood *in loco parentis*, whereon large damages were given;—the plaintiff undertaking to pay the damages to the niece, and the niece not to proceed in an action which she had brought for the assault, the rule for a new trial was discharged. *Edmonson* v. *Machell*, 2 *T. R.* 4. So where a person brought an action on a promissory note given by his wife's father in consideration of marriage; and it appeared that the plaintiff being under age, and, having no parent or guardian, was married *by licence*, and the wife, when the plaintiff came of age, was lying *in extremis*, in her deathbed, and died in three weeks afterwards, the judge left it to the jury to presume a subsequent marriage by banns, and the verdict being for the plaintiff, a rule for a new trial was discharged, *Wilkinson* v. *Payne*, 4 *T. R.* 468. In *Farewell* v. *Chuffey* and others, 1 *Bur.* 54. Lord *Mansfield* said, that a new trial ought to be granted to attain real justice, but not to gratify litigious passions, on every point of *summum jus*, and cited several of the cases which are reported under this title (1). In these cases the verdicts were against evidence and the strict rule of law, but the Court would not give a second chance to a hard action, or an unconscionable defence. Accordingly new trials were refused in *Macrow* v. *Hall*, 1 *Bur.* 11. which was an action for trespass reported to be sufficiently proved, but trifling, frivolous, and vexatious; *Burton* v. *Thompson*, 2 *Bur.* 664. being an action for a libel in which the charge was proved, but the injury appeared very inconsiderable; *Marsh* v. *Bower*, 2 *Bl.* 851. an action for words wherein small damages should have been given; and *Reavely* v. *Manwaring*, *Walker*, and others, 3 *Bur.* 1306. where the defendant *W.* sent a press-gang to take some apprentices of the plaintiff's

(1) Pl. 2, 3, 5, 11, 18, 34.

by their own consent, but appeared to act with good intentions. *Vide* also *Norris* v. *Tyler*, *Cowp.* 37.

A new trial will not be granted for a mistake in the proceedings, 2 *Str.* 1131. *Leeman* v. *Allen*, 2 *Wils.* 160. *Mather* v. *Brinker*, 2 *Wils.* 243.; nor where the verdict could not be supported according to the pleadings or form of action, but the same effect might have been had upon other procedings at law or in equity. *Vide Goslin* v. *Wilcock*, 2 *Wils.* 302. *Foxcroft* v. *Devonshire*, 2 *Bur.* 936. *Sampson* v. *Appleyard*, 3 *Wils.* 272. *Aylett* v. *Lowe*, 2 *Bl.* 1221. *Goodtitle* v. *Bailey*, *Cowp.* 597, 701.

It was formerly a prevalent rule, that there should be no new trial when there was evidence on both sides; but in *Norris* v. *Freeman*, 3 *Wils.* 38. where a writing, purporting to be a release, appeared to be attested by two witnesses, one of whom was called, and the other not, and there was contradictory evidence as to the hand-writing of the party, a new trial was granted, as the other attesting witness should have been called; and the Court held, that there were many cases where new trials would be granted, notwithstanding there was evidence on both sides. The point does not seem to be much regarded in modern practice. The Courts will not grant a new trial because the judge who tried the cause, or themselves, might have drawn a different conclusion from the jury with respect to any matters of fact, if the evidence was proper to leave to the jury concerning such fact, *Ashley* v. *Ashley*, 2 *Str.* 1102. *Anon.* 1 *Wils.* 22. *Swain* v. *Hall*, 3 *Wils.* 45. *Hankey* v. *Trotman*, 1 *Bl.* 1. *Camden* v. *Cowley*, 1 *Bl.* 418. Whether there be any evidence is a question for the judge, whether sufficient evidence is for the jury, *Carpenters Company* in *Shrewsbury* v. *Hayward*, *Doug.* 374. But a new trial will be granted if the jury, upon the facts proved, find a verdict contrary to law, as where they found a verdict for the insured against an underwriter, though a material fact was not disclosed, *Hodgson* v. *Richardson*, 1 *Bl.* 463. So where they found that the holder of a note had used due diligence to obtain payment from the maker, when the Court thought otherwise, it being a question of law; and also upon the same verdict being given a second time, *Tindal* v. *Brown*, 1 *T. R.* 167. *Vide Pillans* v. *Van Mierop*, 3 *Bur.* 1363. The Courts will also grant a new trial if a point has been improperly left to the consideration of the jury; as, whether a loan to save a person from immediate failure, with no other prospect but the chance of being repaid, was fraudulent, *Foxcroft* v. *Devonshire*, 2 *Bur.* 930. 1 *Bl.* 195. Whether by the custom of merchants an indorsement of a bill to *J. S.* (not adding *to his order*) restrained the general negotiability of the bill, it being a matter of law, and clearly and fully fixed, *Edie* v. *the E. I. Com.* 2 *Bur.* 1216. 1 *Bl. Rep.* 295. Whether the charter of a corporation did or did not refer to and adopt antecedent usage, (the construction of charters belonging to the Judge or Court,) *Corporation of Liverpool* v. *Golightly*, *E.* 33 *G.* 3. *B. R. MS.* So when it was left to a jury, 1st, Whether a party's name to an instrument was forged; 2d, Whether, supposing it not to be forged, it was obtained by fraud without her knowing the contents and effect, when there should have been an express direction that the circumstances of the case spoke fraud apparent, *Bright* v. *Eynon*, 1 *Bur.* 390.

A new trial will not be granted if there is a bill of exceptions depending on the same point, unless the party applying will waive the bill of exceptions, *Fabrigas* v. *Mostyn*, 2 *Bl.* 929. If there are two contrary verdicts, the party against whom the last is given is not by any law or practice entitled to a third, *Parker* v. *Ansel*, 2 *Bl.* 963. A new trial will not be granted in a writ of right, unless the verdict is flagrantly wrong, *Tysson* v. *Clerk*, 2 *Bl.* 941. The certificate of the judge respecting the matter of fact as it appeared before him at the trial, is conclusive, *Rex* v. *Poole*, *B. R. Hard.* 23. *Vide* 5 *Bur.* 2667.

It was formerly the rule only to grant new trials upon the merits on payment

of costs, except in particular cases; but it is now considered as a matter generally in the discretion of the Court. But when the judge is mistaken in point of law (1); or the jury find a verdict contrary to his direction as to the matter of law (2); or the plaintiff refuses to submit to a nonsuit, contrary to the opinion of the judge, and a verdict is found for him (3); or a verdict is given properly for the plaintiff on one count, and improperly against him on another (4); or the verdict has been obtained by concealing a witness for the adverse party (5); or by any improper artifice (6); a new trial is granted without costs.

In the King's Bench, if a new trial is granted without any thing being said respecting the costs of the former, and the same verdict is given upon the second trial as the first, the costs of the second only are allowed, *Mason* v. *Skurray*, *Doug*. 438. *Schulbred* v. *Nutt*, n. *ibid*. *Hankey* v. *Smith*, 3 *T. R.* 507; but in the Common Pleas, if two concurrent verdicts are given, the party succeeding is allowed the costs of both trials; if the second differs from the first, the costs only of the second, *Parker* v. *Wells*, *H. Bl.* 639. n. *Trelawney* v. *Thomas*, *H. Bl.* 641. Where the matter in dispute is small, a new trial will not be granted unless it can be done without compelling the party applying to pay costs, *Jackson* v. *Duchaire*, 3 *T. R.* 553.

(1) *Rice* v. *Shute*, 2 *Bl.* 695. *Buscall* v. *Hogg*, 3 *Wils.* 146. *Rackham* v. *Jesup*, *id.* 338. *Vale* v. *Bayle*, *Cowp.* 297. *Harris* v. *Butterley*, *Cowp.* 485. *Goodright* v. *Saul*, 4 *T. R.* 359. (2) *Jackson* v. *Duchaire*, 3 *T. R.* 553. (3) *Pochin* v. *Pawley*, 1 *Bl.* 670. (4) *Edie* v. *E. I. Comp.* 2 *Bur.* 1216. 1 *Bl.* 295. (5) *Montpesson* v. *Randle*, *B. N. P.* 328 (6) *Anderson* v. *George*, 1 *Bur.* 352.

3. SMITH *v.* FRAMPTON.

[Mich. 7 Will. 3. B. R.]

New trial. Vide post. pl. 34.

IN *case* for negligently keeping his fire, *per quod* the plaintiff's house was burnt; the verdict was for the defendant: And after great debate and consideration a new trial was denied; because it is a hard action, and the jurors are judges of the fact: And yet *Holt*, C. J. declared, he was not satisfied with that verdict; *quære*, whether the same case with the precedent? (*a*)

(*a*) *Vide* note to the preceding case.

4. ANONYMOUS.

[Pasch. 8 Will. 3. B. R.]

New trial. Vide post. pl. 7, 8, 13, &c.

THE Court never, or very rarely, grants new trials in actions for words. *Per Holt*, C. J. (*b*)

(*b*) *Vide Barnes* 229, 233. *Com. Pleader*, R. 17.

3. SMITH *v.* PAGE.

[Mich. 3 Will. 3. B. R.]

IN *ejectment* the plaintiff was a mortgagee, and claimed by surrender, whereas the land was not copyhold; and the defendant claimed only by a voluntary conveyance. The verdict was for the plaintiff, and the Court would not set it aside, and grant a new trial against the honesty of the cause (*a*).

No new trial against the equity of the cause. Post. pl. 11. 1 Mod. 2. S. C. Comb. 387.

(*a*) *Vide* note to *Smith* v. *Brampston, supra pl.* 2.

6. HATCHELL *v.* GRIFFITHS. [645]

[Mich. 8 Will. 3. B. R.]

ISSUE was joined in *Trinity term* 1695, and notice then given for trial next assizes, but no farther nor other proceeding till *Trinity* vacation 1696, and then the plaintiff gave a new notice of trial, *viz.* fourteen days notice for next assizes, when he accordingly tried the cause and had a verdict; but because there was no proceeding within a year after the first notice, it was set aside: *Sed nota;* Notice within the term had been a proceeding within the year, and made notice for fourteen days good notice of trial (*b*).

Notice of trial. See 6 Mod. 19, 57. 1 Mod. 1. Ante 457.

(*b*) In *Bogg* v. *Rose*, 2 *Str.*, 211. it was settled on consideration that where a term's notice of trial is required, the notice must be given before the essoign-day. A term's notice is not necessary when the defendant has delayed the proceedings by injunction, *Bosworth* v. *Philips*, 2 *Bl.* 784. *Hayley* v. *Ryley, Doug.* 71.; nor where proceedings have been stayed by agreement for a certain time, *Watkins* v. *Haydon*, 2 *Bl.* 762.; nor where the proceedings have been delayed at the defendant's request, *Bland* v. *Darley*, 3 *T. R.* 530.

7. ANONYMOUS.

S. C. 1 Salk. 273. 2 Salk. 222.

[Mich. 8 Will. 3. C. B.]

A NEW trial was granted because the counsel were absent, not thinking the cause would come on, and no defence was made; but a like motion was denied in *B. R. per Holt*, C. J. Also in one *Coppin's* case, a cause came on at seven in the morning, and an old witness could not rise to be there time enough; but it was denied, unless he would make affidavit of what he knew, and would answer, so that the Court might judge of it, and how it was material.

New trial for the absence of counsel or evidence. Q. Vide 6 Mod. 22, 222, 242. Faresl. 156. Post. 653. 2 Saund. 336. Mod. Ca. 22. 1 Bl. Rep. 298. 3 Bur. 1385. Fitzg. 40. Str. 691. Note to pl. 16.

8. DENT *v.* THE HUNDRED OF HERTFORD.

[Mich. 8 Will. 3. B. R.]

See Faresl. 31, & 37.

A NEW trial was granted upon affidavit, that the foreman declared the plaintiff should never have a verdict whatever witnesses he produced (*a*).

(*a*) If the jury cast lots for the verdict, it will be set aside, *Hale* v. *Cove*, 2 *Str.* 642.: but the Court will not receive an affidavit of the fact from the jurymen themselves, *Vasie* v. *Delaval*, 1 *T. R.* 11. *Vide Comyns* 525. *Bemb.* 51. *Barnes* 438. 2 *Bl.* 1299.

9. KING *v.* BURDETT.

[Mich. 8 Will 3. B. R. 1 Ld. Raym. 148. S. C.]

Jury after going from the bar sent for an act of common council given in evidence, and new trial denied.

A NEW trial was moved for upon affidavit, that the jury took an act of common council out with them, and that printed libels were spread against the defendant; and it was denied: For as to the first it differs from the Lady *Ive's* case, where they took a map of one side, which was evidence on neither side: But this was an act of neither side, and evidence on both; but admitted to be irregular. *Et per Holt*, C. J. So if a jury eat at their own charge, it is fineable, but that verdict shall stand; otherwise if at the charge of one of the parties, and the verdict is found for him. *Vide Mo.* 599. (*b*)

(*b*) With respect to the second point, *Holt* observed, that it was not fixed upon the informers, and if the delivery of papers by a stranger were sufficient to avoid the verdict, the case would never be decided. *Vide* the report in Ld. *Raymond*. If libels are published with intent to influence the jury and the public, it is a sufficient cause to postpone the trial, *Rex* v. *Gray*, 1 *Bur.* 510. *Rex* v. *Joliffe*, 4 *T. R.* 287.

[646]

10. SALISBURY *v.* PROCTOR.

[Hill. 8 Will. 3. B. R.]

Trial refused to be put off till suit in the Spiritual Court determined. S. C. 5 Mod. 324. 3 Salk. 130. Vide 1 Bl. 404. 1 Bur. 511. 4 Bur. 2257.

IN an action by an administrator the Court was moved to put off the trial, till a suit pending in the Spiritual Court concerning the right of administration was determined, which was to come on; which was denied *per Cur.*; for we cannot take notice of suits in the ecclesiastical courts.

11. DEERLY v. THE DUCHESS OF MAZARINE.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 147. S. C.]

UPON *non assumpsit* pleaded, the jury found for the plaintiff, though the duchess gave good evidence of her coverture; and the Court would not grant a new trial, because there was no reason why the duchess, who lived here as a feme sole, should set up coverture to avoid the payment of her just debts (*a*).

New trial not granted for mistake in point of law against the honesty and equity of the cause. Ante, pl. 5. S. C. Ante 116. Comb. 402.

(*a*) From the reports, *ante* 116. 1 Ld. *Raym.* 147. it appears that the Court thought the coverture sufficiently answered in point of law.

12. THERMOLIN v. COLE.

[Hill. 8 Will. 3. B. R.]

IF the defendant appears and makes defence, he shall never have a new trial for want of due notice.

No new trial for want of notice after defence made. Ant. 428, 435. S. C. Ante 41.

13. DOMINUS REX v. BEAR.

[Pasch. 9 Will. 3. B. R. 1 Ld. Raym. 414. S. C.]

UPON an indictment for a libel, the defendant was by verdict acquitted; Mr. Attorney-general moved for a new trial, but it was denied: And the Court said, that anciently it was never done in criminal cases where defendants have been acquitted; latterly, where it has been a verdict obtained by fraud or practice, as stealing away witnesses, &c. it has been done, but never yet was done merely upon the reason that the verdict was against evidence. *Postea Mich.* 10 *W.* 3. *B. R. Per Holt*, C. J. In indictments of perjury we never do it, because the verdict is against evidence; but if you prove a trick*, as no notice, &c., it is otherwise. *Vide* 1 *Lev.* 9, 124. *Ne serra, si le def. soit acquit, alit. s'il soit convict.* (*a*)

Indictment for libel, defendant acquitted, and new trial denied. N. B. Faresl. 31 & 37. S. C. Ante 324, 417. 3 Salk. 226. Carth. 407. Cases B. R. 218. Holt 422.

* Or ill practice. Post. 648.

See 2 *Saund.* 336. *The defendant in error took out a record of nisi prius, and proceeded to trial at the first assizes after issue joined; yet held good, and a new trial denied.*

(*a*) In *Rex* v. *the Parish of Silverton*, 1 *Wils.* 298. after an acquittal on an indictment for not repairing a highway, a new trial for misdirection or over-ruling evidence was refused; new trials being never allowed where the defendant is acquitted in a criminal case.

The trial of an indictment for making a partial rate having been post-

poned till after the trial of a feigned issue, to ascertain whether the rate was partial, and a verdict being given on the issue for the defendant, which was alleged to be against evidence, the Court refused to grant a new trial, because it was within the same reason as if it had been upon a criminal prosecution, *Rex* v. *Prued*, 4 *Bur.* 2227.

In *Mattison* v. *Allanson*, 2 *Str.* 1238. *Fonereau* v. ———, 3 *Wils.* 59. new trials on account of the verdicts being against evidence were refused on penal actions; but in *Wilson* v. *Rastall*, 4 *T. R.* 753. it was ruled that a new trial might be granted in a penal action where the judge had excluded admissible evidence. *Jervois q. t.* v. *Hall*, 1 *Wils.* 17. was held not to be law so far as it proceeded on a contrary principle.

In *Norris* v. *Tyler*, *Cowp.* 37. the Court refused a new trial after a verdict for the defendant in an action for a malicious prosecution, as the suit was of a criminal nature.

[647]

14. TURBERVIL *v.* STAMP.

[Mich. 9 Will. 3. B. R.]

No motion for new trial after motion in arrest of judgment. S. C. Ante 13. Comb. 459. Carth. 425. Skin. 681. Cases B. R. 151. Holt 9.

H. SHALL not move for a new trial after motion in arrest of judgment; but after a motion for a new trial he may move in arrest of judgment. So it is of a writ of inquiry; after motion in arrest of judgment the defendant cannot move for a new writ (*a*). West *versus* Cole, *Mich.* 10 *W.* 3. *B. R.* The same point was held in *C. B. Pasch.* 8 *W.* 3. Philips *versus* Crabb.

(*a*) After motion in arrest of judgment a new trial may be granted for misbehaviour of the jury, *Philips* v. *Fowler*, *Com.* 535.; or where, on the report of the trial of an indictment enough appeared to raise an inclination in the Court to think the defendant ought not to have been convicted, *Rex* v. *Gough*, *Doug.* 797.

15. STARR *v.* WADE.

[Pasch. 10 Will. 3. B. R.]

LESSOR brought trover against the lessee, for trees cut down; yet because the lessee did it in trenching, and the plaintiff had thereby greater advantage, though the jury found for the defendant, yet the Court would not grant a new trial.

16. WITS *v.* POLEHAMPTON.

[Mich. 10 Will. 3. B. R.]

New trial for omission of the party refused. 1 Salk. 273. 6 Mod. 222.

IT was moved for a new trial, because the defendant having pleaded a composition, had forgot to carry down witnesses to prove the subscribers' hands; and the

motion was denied, because the debt was honest. And *Holt*, C. J. remembered where the debt on a bond was brought against an heir, who pleaded *riens per discent*, but the verdict went against him by omitting to bring the settlement to the trial; and the Court being moved, refused to grant a new trial, because it was an honest debt (*a*).

(*a*) *Per* Lord *Mansfield*, *Edie* v. *E. I. Comp.* 1 *Bl.* 298. The suggestion of surprize is not in all cases a reason for a new trial, but in particular cases it may be. In *Spong* v. *Hog*, 2 *Bl.* 802. the defendant might have given evidence in mitigation, which his counsel thought it prudent to omit; but which procured a verdict for him in another cause at the suit of the same plaintiff: this was held no ground for a new trial. In *Gist* v. *Mason*, 1 *T. R.* 84. it was contended at the trial that certain policies were on an illegal trade; but the judge being of opinion that they were not so on the face of them, directed a verdict in support of them; and a motion for a new trial, to let the defendants into evidence to prove the trading so notoriously illegal that the plaintiff must have known it, (which was not offered, on a presumption that the jury must have drawn that conclusion,) was refused; as the defendant made the application to supply his own negligence, when it was evident that he was not taken by surprise at the trial. So in *Fortescue*, 40 *anon.* a similar application on behalf of a party who had made a mistake on the trial in a point of evidence, which would have encountered the evidence given against him, which mistake was discovered since the trial, was refused. *Vide Rogers* v. *Stephens*, 2 *T. R.* 718. where Ld. *Kenyon* said, it would be extremely dangerous to grant a new trial on a suggestion that the party will make out a better case on a second trial. In *Cooke* v. *Berry*, 1 *Wils.* 98. and *Price* v. *Brown*, *Str.* 691. new trials were refused to be granted on affidavits of the falsity of the defence which had been made, and that the plaintiff took the plea to be a sham one, or that no defence was expected. In *Regina* v. *Corporation of Helston*, 10 *Mod.* 202. it was held, that if a point of law be started by the judge, and the counsel do not take it up, but insist on other facts, which are found against them, there ought not to be a new trial on the point of law. A discovery, after the trial, that a witness examined on the other side was interested, is not a sufficient ground for a new trial, but it may weigh as a circumstance where the merits are doubtful, *Turner* v. *Pearte*, 1 *T. R.* 717.

A new trial was granted in a case where the defendant's attorney swore that the defendant had gone abroad before *E.* term, (the cause being tried at the sittings after that term,) and that since the trial he had discovered, in a memorandum-book of the defendant, a receipt signed by the plaintiff, which was set forth *verbatim*. *Vide Broadhead* v. *Marshall*, 2 *Bl.* 955. So where an action was brought for 6000 pagodas, alleged to be deposited by the plaintiff with the defendant, which was sworn to by some *Danish* sailors, and the defendant always denied the whole story, but was not able to contradict the proof at the trial, but moved for a new trial, on the ground that the whole was a fiction, supported by perjury, which he could not be prepared to answer; that since the trial many circumstances had come out to shew the subornation of the witnesses; a new trial was granted after a very strict scrutiny; *Fabrilius* v. *Cook*, 3 *Bur.* 1771.

A verdict was set aside when a material witness for the defendant concealed himself in the plaintiff's house, *Montpesson* v. *Randle*, *Bull. N.P.* 328. So where the defendant, having bought goods from the plaintiff, paid him with the promissory note of a third person, to whom the plaintiff repeatedly gave time till he failed, and the plaintiff

brought an action on the note and for goods sold, the dispute being, which party ought to bear the loss; but at the trial the plaintiff only proved the sale of the goods, and refused to produce the note, though he had it in Court; and the defendant not having given notice to produce it, could not prove it by parol; this being an unfair advantage, contrary to equity and good conscience, *Anderson* v. *George*, 1 *Bur.* 352.

17. ANONYMOUS.

[Mich. 10 Will. 3. B. R.]

New trial or writ of inquiry not granted for too small damages, unless where there is a trick. Comb. 17, 170.

IN covenant to pay a sum certain, *viz.* 100 *l.*, and a grant that upon default it should be lawful for the covenantee to enter and take the profits, the defendant pleaded entry and *prizal del profits* in bar, and judgment was for the plaintiff upon demurrer, and upon the writ of inquiry the jury gave damages, and upon motion a new writ of inquiry was awarded; for debt might have been brought upon this covenant; and this is not like an issue where the jury are to give no more damages than are proved: But here the jury are to give the whole, unless the defendant proves something in mitigation, which was not done in this case; therefore though the common rule holds, *viz.* that no new trial, nor new writ of inquiry, shall be for too small damages; yet there being a contrivance in this case, it differs (*a*).

(*a*) The Court refused to grant a new trial where only 5 *s.* damages had been given in an action for a malicious prosecution, and held that there could be no new trial granted on that account, *Barker* v. *Dixie*, 2 *Str.* 995.; or to set aside an inquisition in an action for maliciously suing out a commission of bankrupt against the plaintiff, and maliciously holding him to bail for 1020 *l.* whereon the jury only gave 5 *l.* damages, though it was proved that the costs of superseding the commission amounted to upwards of 30 *l.* *Mauricet* v. *Brecknock*, *Doug.* 509.

But a new inquiry awarded for too small damages, where there is a mistake in point of law made by the sheriff, as where a person told the plaintiff he could prove a debt, and after the jury were sworn refused to give evidence, and the sheriff thought he could not adjourn, whereupon nominal damages were given, *Markham* v. *Middleton*, 2 *Str.* 1259.; or where the jury have mistaken the law, (the plaintiff and *J. S.* having each deposited 200 *l.* with the defendant on a contract, which *J. S.* not performing the plaintiff sued for his deposite, and the jury, on a notion that the defendant could not pay the money without the consent of both parties, having given nominal damages,) *Woodford* v. *Eades*, 1 *Str.* 425. *Vide Hayward.* v. *Newton*, 2 *Str.* 940. *Tatton* v. *Andrews*, *Barnes* 448. *Anon.* 12 *Mod.* 347.

18. SPARKS v. SPICER.

[Hill. 10 Will. 3. B. R.]

ONE was ordered by the judge of assize to be hanged in chains; the officer hung him *in privito solo;* the owner brought trespass; and upon not guilty the jury found for the defendant, and the Court would not grant a new trial, it being done for convenience of place, and not to affront the owner.

New trial rarely granted in hard actions.

4 T. R. 468. Note to Smith v. Brampston, supra pl. 2.

19. LORD SANDWICH'S *CASE.*

[Trin. 11 Will. 3. B. R.]

WHERE there is value or† difficulty, we are bound of common right to grant trials at the bar. *Inquisitiones de grossis & pluribus articulis quæ magna indigeant examinatione, capiantur soram justiciariis de Bancis. Stat. West.* 2. c. 30. *Per Holt,* C. J. Yet *Trin.* 1 *Ann.* it was denied, because the plaintiff was poor, unless the defendant would agree to take *nisi prius* costs. *Et postea, scil. Trin.* 4 *Ann. B. R.*, between the trustees of my Lady *Sandwich* and my Lord *Sandwich*, though the estate was 3000 *l. per annum*, a new trial at bar was denied, because the title of the lessor of the plaintiff being from the defendant himself, there would be nothing to do but to prove the executing of a conveyance.

Trial at bar, where to be granted or denied. Vide pag. 625, 644, 649, & 651. 1 Vent. 64. S. C. Holt 702.

Vide Doug. 437. (420.) 1 T. R. 363. Str. 479. And. 271. Barnes 447.

† The word *or,* here, should be *and.* Per Cur. Com. B. Trin. 2 Geo. 3.

20. ARGENT v. SIR MARMADUKE DARRELL.

[Hill. 11 Will. 3. B. R. 1 Ld. Raym. 514. S. C.]

IN *ejectment* after a trial at bar, Serjeant *Wright* moved for a new trial, because the verdict was contrary to evidence; the Court thought so too. *Rokeby* was for it on the case in *Style, cæteri contra;* for *per Holt,* C. J. The reason of granting new trials upon verdicts against evidence at the assizes is, because they are subordinate trials appointed by *West.* 2. *c.* 30., *ubi de paucis articulis & facilis est examinatio;* and there have been new trials anciently, as appears from this: That it is a good challenge to the juror, that he hath been a juror before in the same cause; but we must not make ourselves absolute judges of law and fact too; and there never was a new trial after a trial at bar in ejectment, but in case of ill practice;* for the plain-

New trial after trial at bar refused in ejectment, because not conclusive. Vide post. 650. pl. 27. Ante 646. pl. 13. N. B. Farcsl. 31 & 37. Comb. 18, 75. S. C. Carth. 507. Holt 702. Andrews 315. Vide note to pl. 27. infra.

* Or a trick.

tiff may bring a new ejectment: Upon this a new trial at bar was denied in Sir *Richard Temple's* case, where the jury found a point of law on the statute of bankrupts, against the opinion of the Court (*a*).

(*a*) New trials in ejectment are not usually granted where there is a verdict for the defendant; otherwise if there be a verdict for the plaintiff: for in that case the defendant must part with the possession before a new ejectment can be brought. *Vide* 1 *Bl. Rep.* 348. 4 *Bur.* 2224.

[649]

21. ANONYMOUS.

[Hill. 11 Will. 3. B. R.]

1 Vern. 156. Trial per pais 226, 227, 242.

IN *assumpsit* for money won at play, the trial shall not be stayed till an indictment pending for the cheat be tried.

22. ANONYMOUS.

Trial not put off for suit pending in the Ecclesiastical Court on the same matter. R. ac. ante pl.10. 4 Mod. 8.

IN *assumpsit* the issue was, married or not married, and the same point was pending and ready to be determined in the Spiritual Court: And it was held no cause to put off the trial, for the Court cannot take notice of that.

23. TURNER *v.* BARNABY.

[Pasch. 1 Ann. B. R.]

When trial at bar to be moved for. Vide ante 625, 644, 648, & post. 651. Fifteen days notice before a trial at bar.

IF *H.* would have a trial at bar in *Easter term*, he ought to move for it in *Hilary term;* if in *Michaelmas term*, he ought to move for it in *Trinity term*, except where lands lie in *Middlesex;* and anciently there was no other notice given of such trial, but the rule in the office; but now there must be fifteen days notice. *Per Holt*, C. J. (*b*)

(*b*) There are *dicta* in the books that there cannot be a trial at bar in an issuable term; but the case of *Goodtitle ex dem. Revett* v. *Braham*, was tried at bar in *Hilary* term, 32 *Geo.* 3, 4 *T. R.* 497.

S. P. Farcsl. 53, 64. Vide 6 Mod. 222, 242.

24. ANONYMOUS.

[Mich. 1 Ann. B. R.]

New trial for misdirection. 2 Wils. 269. † Or allow, or over-rule evidence. 7Mod.64.

A NEW trial shall be granted if the judge of *nisi prius* misdirect the jury †, because those trials are subject to the inspection of the Court. *Per Holt*, C. J.

25. CLERK v. UDALL.

S.C. Faresl. 106.

[Mich. 1 Ann. B. R.]

New trial for excessive damages, and the same damages given, and third trial refused. See 6 Mod. 22, 242. 1 Lev. 97. 1 Sid. 131. Comb. 17, 170.

UPON a trial at *nisi prius* the jury gave excessive damages, and for this cause a new trial was granted (*a*). The second jury gave the same damages again, and a second new trial was moved for, and denied, because there ought to be an end of things; but several cases were cited which the Chief Justice allowed, that where upon the second trial the jury have doubled the damages, a third trial had been granted (*b*).

(*a*) In actions for *tort*, where the damages depend upon sentiment and opinion, the Courts will not grant a new trial on the ground of excessive damages, unless it appears that they are flagrantly outrageous and extravagant. Therefore they have refused to interpose when 300*l.* was given for a few hours false imprisonment, *Leeman* v. *Aleen*, 2 *Wils.* 160. *Huckle* v. *Money*, *id.* 205.; or 1000*l.* to an attorney for false imprisonment, by a king's messenger, for six days, *Beardmore* v. *Carrington*, 2 *Wils.* 246.; or 200*l.* to one merchant against another for a slight assault, accompanied by ungentleman-like behaviour, *Grey* v. *Grant*, M. P. 2 *Wils.* 252.; or 500*l.* against a custom-house officer, for an unsuccessful search for prohibited goods, *Sharp* v. *Brice*, 2 *Bl.* 942. *Vide* also *Benson* v. *Frederick*, 3 *Bur.* 1845. where 150*l.* damages to a militiaman against his colonel for unlawful corporal punishment; *Fabrigas* v. *Mostyn*, 2 *Bl.* 929. where 3000*l.* in false imprisonment; *Leith* v. *Pope*, 2 *Bl.* 1327. where 1000*l.* for malicious prosecution; *Gilbert* v. *Burtonshaw*, *Cowp.* 230. where 400*l.* for the like injury; *Ducker* v. *Wood*, 1 *T. R.* 277. where 150*l.* for an assault,—were held not excessive damages; but in all the preceding cases it was asserted, that the Court were not precluded from granting a new trial for excessive damages, where they were manifestly unjust, and an evidence of passion or partiality in the jury.

In *Wilford* v. *Berkely*, 1 *Bur.* 609. where 500*l.* damages were given for *crim. con.* against a clerk with a salary of 50*l.* the Court refused to grant a new trial, and seemed to think that in *that* action it could not be done; and in *Duberly* v. *Gunning*, 4 *T. R.* 651., 5000*l.* damages being given in a similar action, Lord *Kenyon*, and *Ashurst*, J. thought a new trial could not be granted, there having been no precedent, though the damages, under the circumstances of the case, were enormous. *Buller*, J. thought there should be a new trial. *Grose*, J. thought that the case did not require a new trial; but did not deny that a case of such an action could exist which might warrant the interference of the Court. In *Jones* v. *Sparrow*, 5 *T. R.* 257. a new trial was granted for excessive damages (40*l.*) in assault; and Lord *Kenyon* said, It must be remembered, that, although *Duberly* v. *Gunning* was decided after a very full discussion of the subject, the Court were not unanimous in their determination; but whether rightly or not decided, that is a case *sui generis*, and cannot govern the present.

(*b*) *Vide Str.* 691. 2 *Wils.* 244. 1 *T. R.* 277. 4 *Bur.* 2108.

S. C. Faresl. 84, 85. 2 Salk. 201. pl. 4. 3 Salk. 363. Holt 184.

26. *THE CASE OF THE MAYOR AND ALDERMEN OF* BRISTOL.

[Mich. 1 Ann. B. R.]

No new trial in inferior courts. 1 Salk. 148, 149, 396. Faresl. 38.

IT was held by the Court, that a new trial cannot be granted in an inferior court; for they are not like trials by *nisi prius*, which are subordinate upon writs issuing out of this Court, over which the Court have authority and inspection; but this was a new trial a year after the first, which the Court blamed (*a*).

(*a*) *R. Brooke* v. *Ewer*, *Str.* 113. that an inferior court could not grant a new trial for excessive damages; but where, after issue joined, or notice of trial given, there is a reference, and the plaintiff afterwards proceeds by surprize, such Court may grant a new trial, *Jewell* v. *Hill*, *Str.* 499. *Streets Case*, 7 *Vin.* 24. In the latter it is said, that though an inferior court cannot grant a new trial after a cause hath been fully heard, yet where a verdict is obtained through surprize, or by any irregularity, it may be set aside. *Vide ac. Bayley* v. *Coorne*, *Str.* 337. *Rex* v. *Peters*, 1 *Bur.* 571. *Blaquiere* v. *Hawkins*, *Doug.* 378. In *Rex* v. *Urling*, *Fort.* 198. it was held, that such Court might set aside a writ of inquiry or judgment, though strictly regular, if obtained by fraud or surprize; and in *Rex* v. *Peters* it was ruled, that a regular interlocutory judgment, though there appeared no fraud or surprize, might be set aside in an inferior court, in order to let in a trial on the merits.

S. C. 1 Salk. 258. Ante 258. Faresl. 70, 121, 156. Holt 263, 266.

27. FENWICK *v.* LADY GROSVENOR.

[Hill. 1 Ann. B. R.]

New trial denied after trial at bar. 5 Mod. 88, 350.

Gay & Cross, Faresl. 37. 6 Mod. 18, 22, 307.

IN *ejectment* after a trial at bar, a new trial was moved for, on affidavits that several witnesses absented themselves in *Holland*, by reason of a report spread abroad there, that one of the defendant's witnesses was confined by imprisonment; but it was denied, because it did not appear that the plaintiff did spread it, or occasioned the spreading of it. The Court was dissatisfied with the verdict, but cited *Cross's* case for a false return of a *mandamus* tried at bar, and by consent of all sides one point was to be found specially, yet the jury found a general verdict, and the Court would not grant a new trial (*b*). It has never been done here but upon issues out of Chancery, which being only to satisfy the conscience of the Chancellor, are not *stricti juris*. So a new trial was denied, *contra opinionem* (*ut videbatur*) *capital. justiciar.* (*c*)

(*b*) *Vide Rep. B. R. Temp. Hard.* 23.

(*c*) *Per* Lord *Mansfield*, *Bright* v. *Eynon*, 1 *Bur.* 395. Of late years new trials have been granted, not only after

trials at *nisi prius*, but also after trials at bar; and it is at least equally reasonable to grant them after trials at bar, as after trials at *nisi prius*, (if the justice of the case demands it,) or indeed rather more so, as the latter must be done upon what could have actually and personally appeared to a *single* Judge only; whereas the latter is grounded upon what must have manifestly and fully appeared to the whole Court. For instances of new trials after trials at bar, *vide Str.* 584. 2 *Ld. Raym.* 1358. 1 *P. Wms.* 212.

28. ASHWIN *v.* CORBILL.

[Mich. 2 Ann. B. R.]

IF a cause hath lain at issue four terms, and no proceeding, there must be a full term's notice of trial, excluding the term wherein the issue was joined.

A term's notice. Vide ante 624, 514. 6 Mod. 146. 1 Sid. 34.

29. LAZIER *v.* DYER.

S. C. ante 457. 6 Mod. 57.

[Mich. 2 Ann. In Canc.]

IT came to be a question, Whether the suing out of a *venire* or *distringas*, after the expiration of the four terms, was a proceeding within the term; because it bears *teste* the last day of the term, and has relation to the term? And the Court held it was not; for though it be legally a proceeding of the term, yet it is not so in fact. *Et nota:* Where it is an issue out of Chancery, notice of trial to the solicitor in that court is good; for as to this, they are but as one court.

Suing out a venire facias tested the last day of the term, not a proceeding within term as to notice of trial. 1 Bl. Rep. 215, 287. 3 Bur. 1241.

30. SIR SAMUEL ASTRY'S *CASE*.

[651]

[Hill. 2 Ann. B. R.]

S.C. 6 Mod. 123.

UPON a *scire facias* brought against Sir *Samuel Astry*, for his place of clerk of the crown in the Court of King's Bench, and issue joined thereupon; Sir *Samuel Astry* moved that the issue might be tried at the bar. The attorney-general opposed it; but the Court said a trial at bar was never denied to any officer of the Court, nor hardly to any gentleman at the bar: And though Mr. Attorney was never bound to consent to a trial by *nisi prius* in the queen's case, yet they did not see how he could refuse a trial at bar, where it was reasonable to try it there; for the statute *West.* 2. *cap.* 3. is *atterminentur*, that they may be determined there, *quæ magna indigeant examinatione.*

Trials at bar not denied to officers of the court, or barristers. Vide ante 625. 2 Keb. 133, 164. 1 Cro. 248. 1 Inst. 424. 1 Sid. 407.

S. C. 6 Mod. 194. 3 Salk. 381. Holt 705.

31. WAY v. YALLY.

[Trin. 3 Ann. B. R.]

If the principal cause be within the jurisdiction, and an issue depending on foreign laws arises, it may be tried in the next county, and foreign laws given in evidence. See 1 Lev. 143. 6 Mod. 228. 1 Jon. 43, 44. 2 Saund. 238. Hob. 37. 1 Cro. 143, 183. 1 Co. 2. 1 Saund. 238. 1 Vent. 59, 286. Hob. 233. 2 Cro. 76. 1 Inst. 261. b.

LESSOR brought debt for rent against his lessee, upon a demise at *London*, of lands in *Jamaica*. The defendant pleaded to the jurisdiction of the Court, that the matter ought to be tried in *Jamaica;* and it was urged that the lessor cannot bring debt here against the assignee of a term of lands in *Ireland*, and that if an entry and ouster were pleaded, it could not be tried here; and in this case the right of the plaintiff and defendant depends on foreign laws which cannot be given in evidence here. *Et per Cur.* Where an action is local it must be laid accordingly; therefore if the lessor declares on the privity of estate, and that lies in *Ireland*, the action must be brought there, for the estate is local; therefore such lessor cannot maintain debt here against an assignee of a term in *Ireland;* for the action is founded on a privity of estate (*a.*) Otherwise where it is founded on a privity of contract, which is transitory; as debt for rent by lessor against lessee; for that may be maintained where the land lies not. Here it is by the lessor against the lessee on the privity of contract; and if a foreign issue, which is local, should happen, it may be tried where the action is laid; for that purpose there may be a suggestion entered on the roll, that such a place in such a county is next adjacent; and it may be tried here by a jury from that place, according to the laws of that country; and upon *nil debet* pleaded you may give the laws of that country in evidence.

Cowper 181. 7 Co. 2. a. Str. 776.

(*a*) *Vide ac.* 1 *Wils.* 165.

[652]

S. C. 1 Salk. 380. 6 Mod. 245. Rep. A. Q. 33.

32. DOMINA REGINA v. SIR JACOB BANKS.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1082. S. C.]

Trial by proviso cannot be in the case of the crown; nor nisi prius, unless by warrant from the Attorney-general. 6 Mod. 246, &c. infra.

SIR *Jacob Banks* was indicted at the quarter-sessions in *Berks*, and the indictment was moved hither by the prosecutor, and now both the prosecutor and defendant made up the record, took out process, and carried down the cause to trial at the assizes; and the defendant put in his record first, tried it, and was acquitted: The prosecutor upon this moved for a new trial, and had it.

Et per Cur. 1st, Before the 5 & 6 *W.* & *M.* *c.* 11., and 8 & 9 *W.* 3. *c.* 33. *H.* indicted in any county might remove it into *B. R.* by *certiorari*, and never was bound by recognizance to try it, unless in *London* and *Middlesex;*

that by this means the defendant was out of court, & *sine die*, and new process was to be awarded, on which he might be outlawed, unless he came in *gratis*, which occasioned great delay, and was the cause of making those acts.

2dly, That removals by defendants are provided for, but removals by prosecutors are not within those acts; and that this removal being before the plea pleaded, the defendant was out of court & *sine die*, but may come in *gratis*, or be brought in by process; and in the last case on pleading shall give security to try it, which he is not obliged to do when he comes in *gratis*. Upon removal of indictment by the prosecutor, if defendant comes in by process, he shall give security to try.

3dly, That in civil actions the defendant shall never carry down a cause by proviso, till there be a laches in the plaintiff; except in causes where the defendant is as a plaintiff, as in replevin, prohibition, *quare impedit*, [against the patron only,] which are to have return, consultation, and writ to the bishop. In what cases the defendant may carry down a cause by proviso. 2 Lev. 5, 6, &c. infra. 6 Mod. 240. & 123. Savil. 2. 2 Sid. 336.

4thly, There can be no trial by proviso, in a cause of the crown, because there can be no default nor laches, nor can the crown be compelled to try any cause by *nisi prius*; and therefore every cause of the crown in this court must be tried at bar, unless the attorney-general allows a warrant of *nisi prius*, which implies his consent to try the cause in the country.

5thly, That as in indictments of treason or felony, if the attorney-general will delay, the Court may give the defendant leave to bring on the trial as they see fit (and so it has been done): So in indictments for misdemeanors, as in this case; the defendant may in the first instance, by the consent of the prosecutor, and leave of the attorney-general, carry down the cause to trial; but it shall not be allowed by surprise on the attorney-general, as here in this case, and also without consent of the prosecutor, or any default in him.

6thly, It was ordered to be a rule hereafter, that when an indictment is removed hither by the prosecutor, the defendant shall not carry it down to trial without leave of the Court on motion. [653]

33. HIGHMORE *v.* WALKER. 6 Mod. 247.

[Mich. 4 Ann. B. R.]

IN a cause to be tried at the sittings, the defendant entered a *ne recipiatur;* and the question was, Whether the plaintiff could go on at the next sittings without a new notice? It was agreed, that if no *ne recipiatur* had been entered, there must have been two days notice. The clerks Two days notice to be given after ne recipiatur at sittings.

upon the principal question thought no notice necessary; their reason was, because the defendant himself had hindered the plaintiff's proceeding, and therefore ought at peril to attend the next sittings. But *Holt*, C. J. *contra*. The notice fell to the ground with the trial: A rule was made, that where a *ne recipiatur* was entered, the plaintiff shall give notice the same sittings, and before they are over, that he will proceed to trial the next sittings: And it was said, that if a cause be not entered two days before the sittings, the defendant may enter a *ne recipiatur*.

34. DUNKLY *v.* WADE.

[Pasch. 5 Ann. B. R.]

Hard action. Vide ante 644, 648. pl. 18. Rep. B. R. Temp. Hard. 201. Note to pl. 2. supra.

IN *case* for negligently keeping his fire, a verdict was found for the plaintiff, and a new trial granted. But *per Cur.* Had a verdict been for the defendant, we would hardly have granted a new trial, because it is a hard action.

35. FORD *v.* TILLY.

S. C. Faresl. 156, 157.

New trial not granted for defect of preparation. See 6 Mod. 22, 222, 242. Ante 645. 1 Salk. 258, 273. Hardr. 71, 121. 1 Wils. 98.

AN inquiry found four voluntary escapes, for which *Ford*, warden of the *Fleet*, forfeited his office. Issues hereupon were tried in *B. R.* at the bar. One escape was proved by a witness, who was asked if he was never burnt in the hand for stealing a tankard? he answered, No (*a*). A new trial was moved for upon producing the record of the conviction, and the Court denied the motion, 1st, Because it was a trial at bar (*b*). 2dly, It is no reason for a new trial that you for the defendant came not prepared; and the Chief Justice said *Soams's* case was a hard case. *Vide* 3 *Keb.* 365, 369. 2 *Lev.* 114. *Postea*, *Pasch.* 4 *Ann. B. R.*, between *Cockroft* and *Smith*, that the party's evidence was not ready, was held no reason for a new trial, though at *nisi prius:* And a new trial was denied (*c*).

(*a*) The question seems such as a witness ought not to be asked. Besides, a person convicted of felony, who is admitted to his clergy, and burnt in the hand, is thereby reenabled to be a witness. *Vide* 2 *Hawk.* ch. 46. s. 20, 21.

(*b*) *Vide* note to *pl.* 27.

(*c*) *Vide* note to *pl.* 16.

TROVER AND CONVERSION.

Ante 597. 1 Lev. 99. 2 Lev. 201. 3 Lev. 336. 5 Mod. 182, &c. 6 Mod. 151, 170, 212. Vide 4 Mod. 156. Yelv. 68.

1. ARNOLD *v.* JEFFREYSON.

[Mich. 9 Will. 3. C. B. 1 Ld. Raym. 275. S. C.]

TROVER *de scripto suo obligatorio per quod tent. & obligat. fuit cuidam J. S.* In arrest of judgment after verdict for the plaintiff, is was held good; for it might be given to the plaintiff, and so shall be intended, and then it was *scriptum suum;* and it is no absurdity, though it were made by him to another; for it is only a description of the deed.

Trover de scripto suo obligatorio, good. S. C. 3 Salk. 247. Holt 498.

2. HARTFORD *v.* JONES.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 393. S. C.]

IN *trover* and *conversion* the defendant pleaded, that the goods were cast away, and they saved and detained them till they were paid for their pains. On demurrer, *Holt,* C. J. held, that they might retain for payment, as a carrier for his hire; and salvage is allowed by all nations: He that serves another ought in reason to be paid for his service; but the plea is naught; for if the detainer be lawful, he does not confess a conversion: I never knew but one special plea good in trover, *viz. Yelv.* 198. (*a*) And the rule was in the principal case, to waive the plea and plead not guilty. *Vide* 2 *Cro.* 68, 69. 3 *Cro.* 262.

Special plea in trover must confess a conversion. Lutw. 1538. 1 Mod. 244. S. C. 3 Salk. 366. Vide Cro. Eliz. 435. Latch. 185. 1 Rol. Rep. 1. 1 Keble 305. Hutt. 10. Ante 516.

(*a*) The plea in *Yelverton* was, that the defendant took the wine mentioned in the declaration for prisage due to the king. The following pleas in trover have been also held good: A former recovery in trespass for the same goods, *Show.* 146.; a recovery in trover against a stranger, *Cro. Jac.* 73.; or against the defendant, 2 *Str.* 1078.; that an innkeeper detained a horse for his meat, 2 *Bulst.* 289.; the Statute of Limitations, *Lut.* 99. *Vide Bull. N. P.* 48.

3. HARTFORD *v.* JONES.

[Pasch. 10 Will. 3. B. R. 1 Ld. Raym. 588. S. C.]

TROVER for twenty ounces of cloves and mace; after a writ of inquiry on a judgment by default, *Holt,* C. J. doubted whether it was good, because it was not

Trover for 20 ounces of cloves and mace, well, without shewing

how much of each, or that they were mixed, ill in detinue. Quær. Vide 5 Mod. 181, 324. 1 Lev. 48. 3 Lev. 18. 2 Lev. 85, 176. 2 Vent. 67. 3 Mod. 70 4 Mod. 324. 5 Mod. 324. 1 Sid. 60, 445. 1 Lev. 48. Fareal. 142. 1 Mod. 46. 1 Vent. 317. 2 Saund. 74.

said, how much cloves and how much mace; or that it was so many ounces *commixt.;* but he said these were incertainties, and that if this was comprised in another action, this recovery would be a good plea in bar. In detinue, this would be ill for incertainty; for the sheriff could not tell how much of one and how much of the other to deliver. The Court gave judgment for the plaintiff, without taking notice of another*exception, *viz.* that it was also *pro viginti parvis instrument. carpentar., vocat.* twenty small carpenter's tools. 2 *Saund.* 74. 2 *Ven.* 78. *Style* 358, 360, 370, 419. 1 *Mod.* 289. 2 *Ven.* 77.

[* 655]

4. ANONYMOUS.

[Trin. 3 Ann. *Coram* Trevor, *C. J.* *At* nisi prius *at* Guildhall.]

Where trover will lie against a carrier. 1 Mod. 30, 31. Comb. 333. 1 Danv. 21. 6 Mod. 212. 2 Ld. Raym. 791.

TROVER lies not against a carrier for negligence, as for losing a box, but it does for an actual wrong; as if he break it to take out goods, or sell it. *Per Cur. Pasch.* 7 *W.* 3. *B. R.* And therefore denial is no evidence of a conversion, if the thing appears to have been really lost by negligence; but if that does not appear, or if the carrier had it in custody when he denied to deliver it, it is good evidence of a conversion. *Per Trevor*, C. J. (*a*)

1 Str. 576. 1 Wils. 328.

Where denial is a conversion. *Vide* 10 *Co.* 56. 1 *Cro.* 262. 1 *Lev.* 173. 1 *Danv.* 21. 2 *Mod.* 245. 3 *Mod.* 2. (1 *Mod.* 244.) 5 *Mod.* 426. 2 *Show. Cas.* 148, 175, 213.

(*a*) *R. ac. Ross* v. *Johnson*, 5 *Bur.* 2825. that trover would not lie against a wharfinger from whose possession goods had been stolen or lost. It will lie against a captain of a ship for delivering goods against an express direction to a wharfinger, on account of a claim of wharfage which is not made out, *Lucas* v. *Hay*, 4 *T. R.* 260. For the general nature of the action, *vide* *Cowper* v. *Chitty*, 1 *Bur.* 20. Note to 3 *Salk.* 367.

TITHES.

See 1 Mod. 229. 6 Mod. 261. 4 Mod. 336, &c. S. C. 4 Mod. 336 to 341.

1. HICK *v.* WOODSON.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 137. S. C.]

County or hundred cannot prescribe in a non decimando for things titheable of common right; otherwise if not titheable of common right.

IN attachment *for prohibition*, the plaintiff declared of a custom in such a hundred, to pay no tithe for agistment of cattle barren. Issue was taken upon the custom, and found for the plaintiff, but judgment was arrested with this entry, *et quia apparet curiæ domini regis hic quod consuetudo præd. nullius vigoris in lege existit, ideo fiat consultatio, &c. Et per Cur.*,

Tithe of agistment of barren cattle due of common right. Vide Faresl. 113, 137. 1 Saund. 141, 142. Carth. 392. Comb. 403. Skin. 560. Holt 671. Cases B. R. 111.

1st, Tithe of agistment is due of common right, because the grass, *&c.* which is eaten, is *de jure* titheable, and must have paid tithe if cut at perfection. And the Court took this difference, *viz.*

That a hundred or a county cannot prescribe in a *non decimando*, for a thing that is in its nature *de jure* titheable; for, as no one single person, or his estate, can; no more, by the same reason, can the hundred, which consists but of many single persons' estates. *Vide March* 26. 1 *Ro. Ab.* 653.

[656]

4 Mod. 336 to 341. Lutw. 1316.

But of things which in their nature are not titheable *de jure*, a hundred or county may prescribe in a *non decimando*, because they are discharged in such case without a custom to the contrary, and they do but insist on their ancient right, and that custom hath not prevailed against it: *Ergo* the case of wood, 1 *Ro. Ab.* 654. *Litt. Rep.* 152, 153., and the hearth-penny, which is but a *modus* for it, they allowed to be good law; because wood is not in its nature titheable, nor within the reason of titheable things, which come not to perfection every year.

Faresl. 113, 137. Pal. 37. 2 Inst. 645.

2. HILL *v.* VAUX.

Vide 6 Mod. 261. S. C. called Leicester versus Foy. Ante 554.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 358. S. C.]

Carth. 461. S. C. Modus to pay a whole meal's milk such a day, and every 9th and 10th night and morning af-

ON a suit in the Spiritual Court for tithe of milk, the plaintiff moved for a prohibition, suggesting a custom in the parish, that the 9th day of *May* at night, and the 10th day of *May* in the morning, the parson was to have the whole meal's milk, and so every 9th and 10th night and

ter, till a young lamb yeaned be heard to bleat, in lieu of tithe of milk, ill. Modus to pay part of the very thing that is tithe, not good, unless payable in another manner. Lat. 222. 6 Mod. 261. Raym. 277. 6 Mod. 229. Cases B. R. 206. Holt 672.

morning, till a young lamb yeaned should be heard to bleat, in lieu of all tithe of milk. And the case of thirty eggs, in lieu of all eggs, was cited 1 *Ro. Ab.* 648, 651. *Et per Cur.* A *modus* to pay one thing for another, or a part of the same thing in another manner, may be good; but a prescription to pay part of the very thing that is tithe, can never be a good *modus*, unless payable in some other manner, so that the parson has a benefit by it. 3 *Cro.* 609. 2 *Cro.* 47. 1 *And.* 799. *Mod.* 229. *Hob.* 250. *Raym.* 277. 3 *Bulst.* 326. (*a*) As to the case of the thirty eggs, he is bound to pay that, whether he has hens or no, and he must pay it at a certain time. But by this *modus* the parson may have nothing; as suppose a lamb be heard to bleat before the 9th of *May*.

(*a*) *Vide* also *Bunb.* 307.

3. THE ARCHBISHOP OF YORK *v.* THE DUKE OF NEWCASTLE.

[Mich. 3 Ann. In Scacc.]

Modus of ten fleeces of wool and two lambs, for all tithe; Court divided whether good or not. Vide 1 Mod. 321.

H. PRESCRIBED to pay ten fleeces of wool and two lambs in lieu of all tithes; and *Price* and *Bury*, Barons, were of opinion this was an ill *modus*, because it is one species of tithe for another, and there is great incertainty; for one fleece may be twice as big, and three times the value of another. *Vide* 2 *Lutw.* 1052. 3 *Cro.* 786, 276. *Mo.* 909. 1 *Ro. Ab.* 649. *Dy.* 149. *Hard.* 174. *Ward*, Chief Baron, and *Smith*, Baron, *contra.* 1st, A *modus* is nothing but a real composition, for or in lieu of tithes, or an annual profit certain and permanent; and they held, that the payment of any one chattel for tithe, was or might be a good *modus* as well as money; for why might not the

[657]

parson originally agree to take ten fleeces for his tithe, as well as a penny? They admitted that payment of tithe of one species, or payment of a *modus* for one species of tithe, could not be a discharge as to another species; but they held that this was not a payment of tithe, nor a payment for a species of tithe; because it was to be paid at all events, whether there be sheep or no: And they denied the case of 1 *Ro. Ab.* 651., and held it no more uncertain than to pay a *modus* of ten cheeses, which may differ vastly, both in nature, quantity, and value; and it tends to the disquiet of the country to break in upon customs and usages; and it ought not to be done but on plain and manifest reason.

Payment of tithe of one species not a good modus for all. Cro. El. 446. Moor 277, 445. Lutw. 1048, 1051.

4. STARTUPP v. DODDERIDGE.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1158. S. C.]

A *MODUS* to pay 2*s*. in the pound of the improved rent in lieu of all tithes, was held naught; for that is to rise and fall as the land is let, and the parson cannot know it: And though a custom to pay the double value for a fine may be good, yet that arises to a man's contract, which shall never be void where it may be reduced to any certainty, and differs from this case of a *modus*, which ought to be as certain as the duty, which is destroyed by it. *Holt*, C. J. *dubitante*, upon a motion for a prohibition (*a*).

Modus to pay 2 s. in the pound of the improved rent, ill. Modus should be as certain as the duty destroyed by it. See Lutw. 1043 to 1053. &c. supra. Ante 551. S. C. Rep. A.Q. 60. LillyEnt. 19.

(*a*) The *modus* was also held void on application to the Common Pleas and Exchequer. *Vide* the report in Ld. *Raymond*. The same *modus* was likewise held bad, 1 Ld. *Raym*. 696. *Vide* 3 *Atk*. 245. *Burn Ecc. Law*, 421.

VARIANCE.

[658]

Ante 434, 452.

1. BRAGG v. DIGBY.

[Pasch. 10 Will. 3. B. R.]

IN *case* on several promises by original, the defendant, without craving *oyer* of the writ, pleaded variance betwixt the writ and the count, shewing particularly wherein: And the plaintiff demurred; and it was adjudged that the defendant should answer over; for he ought to have demanded *oyer* of the writ before he could take advantage of the variance; because though the writ is in court, [*the count*,] yet being not upon the same roll with the count, the defendant cannot plead to it without demanding *oyer* (*b*).

Variance between writ and count not pleadable without craving oyer of the writ. Oyer. Vide ante 497. and post. 701. 3 Lev. 236. 1 Saund. 118. 6 Mod. 303. S.C. Cases B.R. 189. Andrews76.

(*b*) *R*. ac. 2 *Wils*. 85, 295. But *oyer* as an original is not now granted, and the plaintiff may proceed as if it had not been craved, *Boats* v. *Edwards*, *Doug*. 227. *Vide Rex* v. *Amery*, 1 *T. R*. 150.

2. HOLMAN v. BOROUGH.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 791. S. C.]

Deed dated in the year of our Lord set forth with the year of the king also, no variance. Vide Cro. Jac. 261. 1 Ld. Raym. 335.

IN *covenant*, the plaintiff declared of a deed of covenant, bearing date the 30th of *March anno Domini* 1701, *annoq; regni Willi. tertii nunc regis Angl.*, *&c. decimo tertio*, and makes a *profert* of the deed, with a *cujus dat. est. eisdem die & anno:* Upon *oyer* craved, the deed was dated only thus, *viz.* the 30th of *March* 1701, wanting *anno Domini*, and likewise *anno regni*. And though it was demurred to for the variance, the Court held it no variance, for it was implicitly in the deed. *Vide* 41 *E.* 3. 23.

S. C. Far. 87. Holt 200.

3. INCLEDON v. CRIPS.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 814. S. C.]

In debt, where the quantity of the duty depends upon the deed, variance is fatal and cannot be helped by remittitur; otherwise where on matter extrinsic. 1 Salk. 139. 1 Lutw. 459, 539. 2 Vent. 129. 1 Show. 8, 9. Cro. Car. 137, 436, 437. 1 Saund. 282, 285. Fareal. 143, 148. 5 Mod. 213. 1 Sid. 407. Vide Bur. 2231. Doug. 6. 1 H. Bl. 249.

IN *debt*, the plaintiff declared on a deed, whereby the defendant covenanted to pay the plaintiff 35 *l. per* hundred for every hundred of wood in such a place, and that he delivered so many hundreds and one half, which came to 182 *l.* 10 *s.* The defendant demurred. *Et per Cur.*

There can be no apportionment, and the demand for the half hundred is demanding more than can be due by the contract; and then the question was, Whether a *remittitur*, could be entered for that, and judgment given for the rest? *Et per Holt*, C. J.

[* 659]

Vide Str. 1089. Doug. 6. Bur. 2331.

* Where the sum demanded depends on the deed itself, and on nothing extrinsical, as in case of debt or covenant to pay 20 *l.*, there can be no *remittitur;* for the variance is inconsistent with the deed upon which the duty that is demanded entirely depends; otherwise where it may be more or less by matter extrinsic; as in debt for rent, or in the case at bar; in that case, if more be demanded than is due, it may be remitted; for the variance is not inconsistent with the deed: And as the plaintiff is to recover on trial what appears on evidence to be due; so on demurrer he is to have judgment for no more than he ought to recover, and may remit the rest. *Vide Hob.* 178. *Dy.* 65. *Yelv.* 66. 10 *H.* 6. 5. 1 *Saund.* 206, 286.

Vide ante 564, 600. 6 Mod. 42, 132. Far. 120, 121.

4. CHETLEY v. WOOD.

[Mich. 2 Ann. B. R.]

Recognizance in C. B. taken at a Judge's chamber pleaded as

IN *debt* upon a recognizance, the plaintiff declared as on a recognizance acknowledged in the court of Common Pleas, *coram G. Treby, mil & sociis suis; nul tiel re-*

cord was pleaded, and the record produced was a recognizance taken before Mr. Justice *Nevil*, at his chambers in *Serjeant's Inn*, and by him brought and delivered into court; and it was adjudged that the plaintiff has failed of his record: For the record is such as it is entered upon the roll, and in pleading must be so described: Accordingly the court of King's Bench do enter all recognizances as taken in court, but the Common Pleas enter specially; so that their recognizances bind from the caption, ours from the time of entry; also upon theirs a *scire facias* lies in either county; but on a recognizance in *B. R.* in the county of *Middlesex* only; therefore these differ in substance; and as to the usage of declaring this way, which was insisted on, the Chief Justice said it was against law.

taken in court; variance. Lutw. 1287. S. C. 3 D. 314. p. 6. Holt 612. Recognizance of bail in C. B. binds from the caption, in B. R. from the entry only. Mod. Cases 42. S. C. 1 Cro. 312. Hob. 195. Aleyn. 12.

5. ROBERTS *v.* HARNAGE.

[Mich. 3 Ann. B. R. 2 Ld. Raym. 1043. S. C.]

IN debt upon a bond, the plaintiff declared, *quod cum* the defendant *apud London., viz. in paroch. beatæ Mariæ de Arcubus in warda de Cheape per scriptum suum obligatorium concessisset se teneri* to the plaintiff in 40*l.* *solvend.* to the plaintiff, *&c.*; the defendant craved *oyer*, and the bond was to the plaintiff to pay 40*l.* to his attorney or his assigns; and was dated at *Port St. Davids* in the *East Indies*.

Bond to A. in 40l. solvend. to his attorney, declared on as payable to A. and no variance. S. C. 6 Mod. 228.

The defendant pleaded these variances in abatement, and upon demurrer the Court held,

1st, That the first was no variance; for payment to the plaintiff or his attorney is the same thing. The *teneri* made it a debt to the plaintiff, and in consequence it may be paid to him; a *solvendum* to any body else would be repugnant. *Vide* 4 *Ed.* 4. 29. *Sid.* 295. 2 *Keb.* 81. But payment to the plaintiff's attorney or his assignee is the same thing. [660]

2dly, The second variance was held fatal, though it was objected that the place was only used as a *venue*, for the dating made the bond local; and it is not a bond dated at *London*, because there is an express date at *Port St. Davids;* but the plaintiff might have declared, that the defendant *apud Port St. Davids* in the *East Indies*, *viz. apud London. in paroch., &c.*, for that was only using *London, &c.* for a place of trial. *Broderick pro quer. Parker pro def.* (*a*)

1 Str. 612. Cowp. 178.

(*a*) A party is not bound to state the material parts of a contract in words and letters; it will be sufficient to state the substance and legal effect, which is not liable to misrecitals and literal mistakes, *Bristow* v. *Wright*,

Doug. 667. *Vide Dundas* v. *Ld. Weymouth, Cowp*. 665. A trivial variation in setting out a contract, a record, or any written instrument, is fatal, because it does not appear that the contract given in evidence is that in which the plaintiff declares it is matter of description; *Drewry* v. *Twiss*, 4 *T. R.* 558.

A declaration, that the defendant agreed to leave a farm in tenantable repair, is supported by proof that he agreed to leave it in as good condition as he found it, which was in tenantable repair, *Wrim* v. *White*, 2 *Bl. Rep.* 840. Declaration for a malicious indictment before justices, *ad div. fel. necnon ad pac. conserv.*, is supported by indictment before justices *ad pacem tantum*, who had power to receive such indictment, *Barnes* v. *Constantine*, *Yelv.* 46., *Cro. Jac.* 32.; so where the indictment was stated to be at the quarter-sessions, and proved to be at the general-sessions for *Middlesex*, *Busby* v. *Watson*, 2 *Bl.* 1052. It is not a fatal variance in an action for bribery to state a bribe to vote for *A.* and *B.*; when the evidence is of a bribe to vote for *A.* and his friend, *Coombe* v. *Pitt*, 3 *Bur.* 1586; or to state the precept to the mayor, as concluding "and IF the said election should certify," when the word *if* is not in the precept, and is insensible, *King* v. *Pippet*, 1 *T. R.* 235; nor in an action of false imprisonment, to state that the sheriff was commanded to take *A. B.* and *John Doe, if, &c. and them, &c.*, when the writ produced contained at full length, "if they shall be found in your bailiwick, and them safely keep," *Wilson* v. *Mawson*, cited *ibid.*; nor in action for the escape of *A. B.*, to state a *latitat* against *A. B.* and *John Doe*, instead of *A. B.* and *C. D.*, *Hendray* v. *Spencer*, *id. ibid.*; nor in an indictment for perjury in an answer in Chancery, to state the bill as directed to *R.* Lord *H.* instead of Sir *R. H.*, *Rex* v. *Lockup*, *id. ibid.*; nor to state a precept as directed to the mayor, instead of the mayor and burgesses, *Cuming* v. *Sibley*, *id. ibid.*; nor to state an *assumpsit* to re-deliver a bond of Lord *Gave*, instead of Lord *Gage*, the latter word being used in the other parts of the declaration, *Alcorn* v. *Westbrook*, 1 *Wils.* 115.; nor in an action by a consignor against a carrier, to state the consideration to be a hire to be paid by the plaintiff, when it was agreed to be paid by the consignee, *Moore* v. *Wilson*, 1 *T. R.* 659.; nor in covenant against an *heir*, to state that the interest came to him by assignment, *Densly* v. *Constance*, 4 *T. R.* 75.; nor in an action for removing goods to prevent distress, to state a wrong sum as due for rent, *Gwinnet* v. *Philips*, 3 *T. R.* 643. [In that case Lord *Kenyon* said, "Good sense will reconcile all the authorities: if the plaintiff allege any thing which forms a constituent part of his title, he must set it out correctly."] nor in case for running down a boat, to state as *near*, instead of *in*, the half-way-reach, *Drewry* v. *Twiss*, 4 *T. R.* 558.; nor to state an *assumpsit* to procure a booth at the races at *B.* in the county of *M.* instead of the county of *H.*, *Frith* v. *Gray*, *n. ibid.*; nor to state that a ship sailed *after* the making a policy, when it had sailed *before*, *Peppin* v. *Solomons*, 5 *T. R.* 496.; nor in action for usury to state the lending of a given sum of money, when goods of an ascertained value were taken as money, *Barber* v. *Parker*, *H. Bl.* 283.; or in justifying on account of a public highway, to state, as leading over the *locus in quo* from road *A.* to road *B.*, when a road *C.* intervenes between the *locus* and *B.*, *Rouse* v. *Bardin*, *H. Bl.* 351.

It is a fatal variance, if, in an action for extortion, a judgment is set forth, and the extortion is stated to be committed in executing a *fi. fa.* on the *said* judgment, unless the judgment is proved as laid, *Savage* v. *Smith*, 2 *Bl.* 1104.; or in an action for double rent on the statute, to state a demise to have been for three years, which in legal effect was only from year to year, *Shute* v. *Hornsey*, cited *Doug.* 668.; or in an action for not leaving a year's rent upon taking goods in execution,

to state reservation of rent payable at four quarters, when there was no stipulation about the times of payment, *Bristow* v. *Wright, Doug.* 664.; or to state an usurious contract on a loan from the 21st *December* 1774 to the 23d *December* 1776, when the loan was made on the 23d *December* 1774, for two years, *Carlisle* v. *Trears, Cowp.* 671.; or in covenant, to state the defendant to be assignee of *all* the premises demised, when a part was excepted, *Hare* v. *Cator, Cowp.* 766.; or in *assumpsit* on a private statute, to state it as made the 4th, instead of the 4th and 5th, *Ph. & Mary, (viz.* 4 *Ph. & 5 Mar.) Rann* v. *Green, Cowp.* 474.; or in an action against an attorney for negligence in not proceeding against a defendant in custody, if the return of the writ is mistated, *Green* v. *Kennett*, 1 *T. R.* 656.; or in an action for a malicious prosecution, if the trial on that prosecution appears by the record to vary in the day from that stated, *Pope* v *Foster*, 4 *T. R.* 590.; or if a contract is stated to pay the defendant 4*s. per* stone, and the proof is of a contract to pay 4*s.* and as much more as the plaintiff gave any other person, *Churchill* v. *Wilkins*, 1 *T. R.* 447.; or if a loan, to be repaid on one of two given days at the defendant's option, is in one plea stated as a forbearance to the first day, and in the other until the second, and not in the alternative agreeable to the fact, *Tate* v. *Wellings*, 3 *T. R.* 531.; or if an agreement to deliver an undrawn ticket or pay 20*l.* is stated disjunctively, instead of alternatively, *Layton* v. *Pearce, Doug.* 15.; or if the declaration is on an agreement to sell so many bushels of corn, and the proof is of an agreement for bushels different from the statute measure, *Hockin* v. *Cooke*, 4 *T. R.* 314.; or if the defendant is sued as on a promissory note made by himself and another person who is outlawed, and that person is misnamed, *Gordon* v. *Austin*, 4 *T. R.* 611.; or if the agreement declared on is to deliver goods to a third person, and the evidence is of an agreement to deliver to the defendant, *Leery* v. *Goodson*, 4 *T. R.* 687.; or if the plaintiff declares on a covenant to do work by a certain day, which he performed, and it is proved that he did not do the work by that day, but the time had been enlarged by a subsequent agreement, *Littler* v. *Holland*, 3 *T. R.* 590.; or in debt on an amercement, to state a court to have been held before the steward instead of the deputy-steward, *Wyvil* v. *Shepherd, H. Bl.* 162.

For the difference between impertinent and immaterial averments, *vide Savage* v. *Smith, Bristow* v. *Wright, ubi sup.*

Vide also *Smith* v. *Hickson, B. R. Hard.* 54; *Pope* v. *Skinner, Hob.* 72.; *Roberts* v. *Hubert*, 1 *Sid.* 5.; *Ime* v. *Hay, Fort.* 353.; *Harris* v. *Bernard, Str.* 1069.; *Baynes* v. *Forrest, Str.* 890.; *Fisher* v. *Sowerby, B. R. Hard.* 131.; *Williams* v. *Ogle, Str.* 889.

6. DARBY *v.* ANELY.

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1170. S. C.]

Writ of error of a record per billam, the record returned per breve de privilegio, quashed.

A WRIT of error was brought of a judgment in *C. B.*, reciting, *quia in recordo & processu ac etiam in redditione judicii loquelæ quæ fuit in curia nostra per billam.* The record was *attachiatus fuit per breve de privilegio e curia hic emanan. ad respondend.* the plaintiff, an attorney of that court *juxta libertates, &c. de placito transgr. super casum;* and the writ of error was quashed for this variance. *Vide Lutw.* 1634, 1637, 905. (*a*)

(*a*) *Vide* 5 *G.* 1. c. 13. *sect.* 1., by which variances of this kind are made amendable.

7. DOMINA REGINA *v.* DR. DRAKE.

[Mich. 5 Ann. B. R.]

Information for a libel, variance in the word *nor* for *not* held fatal upon evidence. See 6 Mod. 168. Raym. 74. Tenor imports a true copy. 1 Keb. 531. Farest. 161. Hob. 59. 1 Sid. 148, 153, 217. S. C. 3 Salk. 224. Rep. A. Q. 78, 84, 95. Holt 347, 349, 350, 425.

INFORMATION for that the defendant being evilly disposed to the government, did make a libel, in which libel were contained divers scandalous matters *secundum tenorem sequent.*, and in setting forth a sentence of the libel, it was recited with the word *nor* instead of *not;* but *note*, the sense was not altered thereby. The defendant pleaded not guilty; and this appeared upon evidence, a special verdict was found. *Et per Curiam,*

1st, *Cujus quidem tenor* imports a true copy. *Vide Reg.* 169. 8 *Co.* 78. *Co. Ent.* 508. 2 *Saund.* 121., *in hac quæ sequitur forma*, 5 *Co.* 53., *tenor* is a transcript, and implies the very same.

2dly, They held that this was not a *tenor*, by reason of this variance; for *not* and *nor* are different; different in grammar and different in sense. And *Powys*, J. held as to the point where literal omissions, *&c.* would be fatal, that where a letter omitted or changed makes another word, it is a fatal variance; otherwise where the word continues the same (*a*): And in the principal case, no man would swear this to be a true copy.

[661]

In declaring for words spoken, variance in omission or addition not material, if the words proved are actionable; otherwise in tenor of words written.

3dly, The Court held, that there was a difference between words spoken and words written; of the former there could not be a *tenor:* for there was no original to compare them with, as there is of words written; and though there have been attempts to plead a *quorum tenor* of words spoken, it has never been allowed; and therefore where one declares for words spoken, variance in the omission or addition of a word is not material; and it is sufficient if so many of the words be proved and found as are in themselves actionable. *Vide Dy.* 75. 3 *Cro.* 503. *Hard.* 470. Otherwise in debt upon a bond; for upon *non est factum* any variance is fatal.

In pleading a libel may be set forth in hæc verba, or by the sense and substance of it.

4thly, *Holt*, C. J. held, that in pleading there were two ways of describing a libel or other writing, by the words or by the sense: By the words, as if you declare of a libel *cujus tenor sequitur, &c.*, or *quæ sequitur in his Anglicanis verbis sequentibus*, you describe it by its particular words, of which each is such a mark, that if you vary you fail in making good their description. *Vide Dy.* 203. If a man bring trespass *quære clausum fregit*, and sets forth abuttals and bounds, and fails in proving them, he is gone; and yet he needed not to have described it after that

(*a*) Cited and *r. acc. Cowp.* 229. *Vide Str.* 229. *Doug.* 194.

manner. 2dly, You may describe it by its sense and meaning; thus it is a good information to shew, that the defendant made a writing, and therein said so and so, translating it into *Latin;* in which case, exactness in words is not so material, because it is described by the sense and substance of it.

VERDICTS.

[662]

Vide Co. Lit. 226. 1 Saund. 230. 2 Saund. 97, 171, 255. Raym. 193. 5 Mod. 351.

1. BUXENDIN *v.* SHARP.

[Pasch. 8 Will. 3. C. B.]

THE plaintiff declared that the defendant kept a bull that used to run at men; but did not say, *sciens* or *scienter*, *&c.* This was held naught after a verdict; for the action lies not unless the master knows of this quality, and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration.

S. C. 3 Salk. 12. Vide 2 Str. 1023, 1264. Cowp. 826. Doug. 658.

2. JENKINS *v.* TURNER.

[Mich. 8 Will. 3. C. B. 1 Ld. Raym. 109. S. C.]

THE plaintiff declared that the defendant kept a boar *ad mordend. animalia consuet.*, and knew of this habit, and that the boar did bite, *&c.* This was held good after verdict, though it was objected that these animals may be frogs or mice, *&c.*, for we must intend there was proof of biting such animals as will support the action, otherwise the judge and jury would not have concurred in this verdict, whereby the plaintiff recovers damages: And as to another objection, *viz.* that the defendant cannot know what animals he is to defend against; it was answered, that no evidence can be given of killing any animals but what he has knowledge of.

Action for keeping a boar ad mordend. animalia consuet. held well after verdict. 1 Show. 539. 1 Lutw. 899. S. C. 3 Salk. 13.

3. ACTON v. EELS.

[Mich. 8 Will. 3. B. R. Comyns 12. S. C. called—— and Blackall v. Heal and others.]

Damages given in trespass laid at a time not come, it shall be intended another time was proved. Vid. 1 Mod. 292. (S C. Cart. 389. 5 Mod. 286. 6 Mod. 102.)

IN *trespass* for assault and battery, and verdict for the plaintiff, it was moved in arrest of judgment, that the time laid in the declaration was not yet come. *Et per Cur.* Then it is a time impossible, and the jury must be supposed to give damages for another trespass; and it is as if no time had been alleged; otherwise if the time had been laid after the action, and before the verdict, for that shall be intended to be the trespass that was given in evidence, and that was after the action brought; and so it is where it appears that the jury give damages for a time not come, as in 2 *Saund.* 169., where the contrary cannot be intended, 3 *Keb.* 304. in point. Judgment for the plaintiff. Then *Northey* moved that they might have leave to enter the judgment as of the preceding term, because the plaintiff died since the verdict. *Curia*, Enter it as you can, but at your peril, we give no leave nor directions about it.

[663]

Vide Doug. 61. 2 Bur. 1159. Gilb. C. B. 131.

4. ROE v. GATEHOUSE.

[Mich. 8 Will. 3. B. R. 1 Ld. Raym. 145. S. C.]

Incertainty in count cured by verdict. Vide 1 Lutw. 899. 1 Saund. 154, 155. 2 Saund. 171. 2 Vent. 141, 142, 196. Carth. 379. S. C. 1 Lutw. 234. 6 Mod. 227, 286, &c. Fareal. 143. S.C. 5 Mod. 305. 3 Lev. 55. 1 Sid. 309. 1 Saund. 6, 7. Comb. 404. 1 Salk. 26. Str. 793. 2 Ld. Raym. 1526.

ASSUMPSIT, *quod cum* the defendant was indebted to him in 5*l.* for money lent, and promised to pay; *cumq. etiam* at the request of the defendant the plaintiff found horse-meat for *J. S. super se assumpsit;* and says not that the defendant *super se assumpsit.* A verdict being for the plaintiff and entire damages, and a writ of error brought in *B. R.*, relying upon 3 *Cro.* 913. and *Noy* 50., for *J. S.* might as well be the person promising as the defendant; and the promise is the gist of the action; and an incertainty in that cannot be cured by intendment after verdict. *Sed per Cur.* It being said positively at first, that the defendant *super se assumpsit*, and then *cumq. etiam*, *&c.*, the same nominative shall go to all the promises; and by reason of the word *etiam*, it cannot be intended of a promise by *J. S.*, for he had not promised before. Judgment affirmed. *Vide Sid.* 292, 306. *Lutw.* 125. 3 *Co.* 703.

5. PRINCE *v.* MOLT.

[Pasch. 9 Will. 3. B. R. 1 Ld. Raym. 248. S. C.]

IN case the plaintiff declared, *quod cum quer.* 3 *Julii possessionat. fuisset de quodam clauso prædict. defend.* 3 *Augusti erexit novum molendinum & aquam currentem fecit inundare per quod inundavit clausum suum prædict. per quod totum usum & proficuum inde eodem secundo die Julii usque tempus exhibitionis billæ prædict. amisit:* Verdict *pro quer.*, and entire damages; but judgment was arrested; for an erection on the 3d day of *August*, might make him lose a particular gain or profit from the 2d day of *July*, as if he had laid in the meadow for hay. But by an erection on the 3d day of *August* he could never lose *totam usum proficuum* from the 2d day of *July*: therefore he has recovered more damages than he ought, and this case is not to be distinguished from *Moor* 887. *Hob.* 189.

Judgment arrested because more damages recovered than ought. Vide 1 Saund. 154, 155. 2 Saund. 171. 1 Vent. 10. Carth. 386. S. C. called Prince versus Moultin. 2 Mod. 154. Comb. 442, 443. S. C. Cases B. R. 131. Holt 192. Vide Doug. 696.

[664]

6. East *v.* Eslington. Mich. 1 Ann. B. R. *Vide* this Case, title *Bills of Exchange*. Vol. 1. pag. 130. pl. 14.

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7. CROWTHER *v.* OLDFIELD.

[Hill. 4 Ann. B. R. *Vide* this Case, title *Jeofails*. Vol. 1. pag. 364. pl. 5. 2 Ld. Raym. 1225. S. C.]

WHERE a verdict will aid a title defectively set forth, but not defective in itself.

8. HADLEY *v.* STYLES.

[Mich. 9 Ann. B. R.]

DEBT on a bill penal for 300 *l.* The defendant pleaded *nil debet*, and the plaintiff took issue thereon, and the jury found *nil debet* for 200 *l.*, and *debet* as to 100 *l.* Mr. *Lutwyche* urged, that this plea, issue, and verdict were immaterial, and that the debt could not be apportioned. *Et per Cur.* The plea was ill, but the verdict has made it good: We will intend 200 *l.* paid, and an acquittance under seal produced in proof thereof; and the jury may as well apportion here as in debt on a simple contract, where they may find *nil debet* for part. *Vide Mo.* 957. 1 *Rol. Rep.* 257.

In debt on single bill and nil debet pleaded, the jury find nil debet to part and debet to the rest, well after verdict. Vide 1 Mod. 292. 1 Show. 539. 3 Lev. 55. 2 Saund. 255, 308. 2 Wils. 10.

Vide 1 Show. 3. 2 Lev. 117.

VIEW.

1. KEMPSTET v. DEACON.

[Pasch. 8 Will. 3. C. B.]

A VIEW is grantable, but that is only where the title is in question.

2. ANONYMOUS.

[Trin. 10 Will. 3. B. R.]

Method of proceeding in case of a view. 2 Saund. 254. 6 Mod. 211, 265. 1 Keb. 279, 418. 3 Keb. 103, 254, 485.

IT was ordered, that when in order to a view, the last juror is withdrawn, the plaintiff shall take out a new *distringas*, *amoto* the last man of the panel, to distrain the other twenty-three, with an *aponas etiam decem tales*. At the trial of this cause for want of a full jury upon the principal panel, some *tales-men* were sworn and had the view, but the *distringas* was returnable as an original *distringas*, and so many of the principal panel left out, who were not at the view; of which the defendant complained, and would have set aside the trial for irregularity; but because no *venire* appeared to the Court, and the matter stood upon record as an original trial, and the want of a *venire* was helped by verdict; and because the cause was tried by those that were fittest, *viz.* those who had the view; the Court would do nothing in it, but ordered the other course for the future.

3. ANONYMOUS.

[Mich. 4 Ann. B. R.]

PER Holt, C. J. Before we make a rule for a view, the *venire facias* must be returned, and then we may make a rule, that so many of the panel shall view the premises (*a*).

(*a*) *Vide* stat. 4 & 5 *Ann.* *c.* 16. *s.* 8. 3 *Geo.* 3. *c.* 24. *s.* 8. *Bur.* 253.

VILLEINS AND VILLENAGE.

1. SMITH v. BROWN AND COOPER.

[2 Ld. Raym. 1274.]

THE plaintiff declared in an *indebitatus assumpsit* for 20 *l.* for a negro sold by the plaintiff to the defendant, *viz. in parochia beatæ Mariæ de Arcubus in warda de Cheape*, and verdict for the plaintiff; and, on motion in arrest of judgment, *Holt*, C. J. held, that as soon as a negro comes into *England*, he becomes free: One may be a villein in *England*, but not a slave. *Et per Powell*, J. In a villein the owner has a property, but it is an inheritance; in a ward he has a property, but it is a chattel real; the law took no notice of a negro. *Holt*, C. J. You should have averred in the declaration, that the sale was in *Virginia*, and, by the laws of that country, negroes are saleable; for the laws of *England* do not extend to *Virginia*, being a conquered country their law is what the king pleases; and we cannot take notice of it but as set forth; therefore he directed the plaintiff should amend, and the declaration should be made, that the defendant was indebted to the plaintiff for a negro sold here at *London*, but that the said negro at the time of sale was in *Virginia*, and that negroes, by the laws and statutes of *Virginia*, are saleable as chattels. Then the attorney-general coming in, said, they were inheritances, and transferrable by deed, and not without: And nothing was done.

Indebitatus assumpsit for a negro sold. Q. Whether inheritances, or not? S. C. Holt 495.

2 Vent. 4. Ante 411, 510. 3 Mod. 161.

2. SMITH v. GOULD.

Vide 5 Mod. 186, 187. 2 Lev. 201. 3 Lev. 336.

[Mich. 4 Ann. B. R. 2 Ld. Raym. 1274. S. C.]

TROVER for several things, and among the rest *de uno Æthiope vocat.* a negro; and, on not guilty pleaded, verdict was for the plaintiff, and several damages; and as to the negro 30 *l.* And it was moved in arrest of judgment, that trover lay not for a negro, for that the owner had not an absolute property in him; he could not kill him as he could an ox. *Contra*, It was said property implies the right of having and enjoying, and disposing; but it does not always imply a power to destroy; that this power

Trover lies not for a negro; but in trespass quare captivum suum cepit, plaintiff may give in evidence that he was his negro. Differences between property in things having a natural exist-

ence and a civil existence only. Vide ante 556, 637.

holds in beasts, fowl, and fish, which were made the property of mankind by the act of God, and have a natural existence, but not in things incorporeal, which consist *in jure tantum;* for this being a property *ex instituto* only, the owner has only a power according to the measure of this instituted right: And it was instanced in the case of a common, a way, and a ward. On a *ca. sa.* the plaintiff has an interest in the body of the prisoner as a pledge not to sell but to keep, and it goes to the executors. *Hob.* 61. In a servant to work him; in a captive to sell him. *Reg.* 102. *F. N. Br.* 88. *a.* *B. N. C.* 295. *Bro. Property* 38. 1 *H.* 6. *c.* 5. *in Rast.* 219. *Cot. Abb.* 460. That the writ *de nativo habendo* must lay the explees of a villein in working and taxing him at will. *Co. Ent.* 406. That by the law of *Moses* a man may be a slave, and a slave was a chattel, *his master's money*, *Exod.* 20,21. That by the same reason there may be a *servus prædialis*, *i. e.* a *villein.* One may be a *servus personalis*, and that first a captive and afterwards a villein. *Hob.* 97. *Brownl.* 78. A villein in gross is a chattel, for he is of a perishable nature, and cannot endure for ever. So is *Fitz. Discontinuance* 16. *Br. Villein* 60. As villeins are regardant to land it is a different thing, and in that respect they are inheritances, and so are the charters. Every villein is intended in law regardant; the writ in the register therefore supposes him to be *nativum suum*, but before he was a villein he was a captive, and then a chattel. Lastly, It was insisted, that the Court ought to take notice that they were merchandize, and cited 2 *Cro.* 262. The case of monkeys, 2 *Lev.* 201. 3 *Keb.* 785. 1 *Inst.* 112. If I imprison my negro, a *habeas corpus* will not lie to deliver him, for by *magna charta* he must be *liber homo*, 2 Inst. 45. *Sed Curia contra*, Men may be the owners, and therefore cannot be the subject of property. Villenage arose from captivity, and a man may have trespass *quare captivum suum cepit*, but cannot have trover *de gallico suo.* And the Court seemed to think that in trespass *quare captivum suum cepit*, the plaintiff might give in evidence that the party was his negro, and he bought him.

Servus prædialis and personalis. 3 Lev. 336. Hob. 283. Vide March 12. Raym. 16. Cro. Car. 19, 391, 545. Cro. El. 126, 545. Cro. Jac. 262, 463.

VISNE.

1 Lev. 149. 2 Lev. 237. Cro. Car. 278. Raym. 67, 417, &c.

1. SEAMAN *v.* LING.

[Mich. 9 Will. 3. B. R.]

IF the defendant be a barrister, he may have the *visne* changed to *Middlesex*. In *Trin.* 2 *Ann.*, *Wilcocks*, an attorney, was sued by bill of privilege, and the action was laid in *Suffolk;* and upon motion the *venue* was changed into *Middlesex;* and *vide* 2 *Ven'*. 47. If an attorney being plaintiff lay his action in *Middlesex*, the *venue* shall not be changed; otherwise if in *London* (*a*).

If the defendant be a barrister or attorney, he may change the venue to Middlesex. See 1 Mod. 64. 2 Show. 242, 176. 1 Vent. 1, 11, 16, 29, 298.

(*a*) It is now fully settled, that a barrister, attorney, or other privileged person, has no right as such, when a defendant, to have the *venue* changed into *Middlesex*, *Pope* v. *Redfearne*, 4 *Bur.* 2027.; *Yeardly* v. *Roe*, 3 *T. R.* 573.; but when they are plaintiffs, the *venue* cannot be changed from *Middlesex* upon affidavit of the cause of action arising elsewhere, *Spelman's* case, 1 *Wils.* 159. 1 *Bl.* 19. The privilege subsists though both the plaintiff and defendant are attornies resident within the county to which the *venue* is attempted to be changed, *Pye* v. *Leigh*, 2 *Bl.* 1065.

2. ANONYMOUS.

[Pasch. 8 Will. 3. B. R.]

PER Holt, C. J. The motion to change a *venue* ought to be within eight days after the declaration delivered; but this rule is not always strictly adhered to. But, *Trin.* 7 *W.* 3. *B. R.*, it was said by *Aston*, one might move to change the *venue* at any time before judgment signed, which *Holt*, C. J. denied, saying, heretofore it was never granted after the rules for pleading were out.

When motion to change the venue ought to be made. Vide Str. 211. 1 Wils 245.

3. THE DUKE OF NORFOLK *v.* ALDERTON.

[Pasch. 9 Will. 3. B. R.]

A MOTION was made to change a *visne* in an action of *scandalum magnatum* upon the common affidavit, insisting on my Lord *Shaftsbury's* case, 2 *Jo.* 192, 198., but it was denied; for in my Lord *Shaftsbury's* case, it was on an affidavit of the vast interest he had in the city, and the

Visne refused to be changed in an action of scandalum magnatum. Vide 1 Lev. 56, 149. 3 Keb. 39. 1 Lev. 307.

1 Vent. 364. S. C. Carth. 400. Cases B. R. 121. 2 Jon. 192. Skin. 40.

unlikeliness of an impartial trial; but we will not deprive the plaintiff of that benefit the law gives him, of laying his action where he pleases, for the convenience of the defendant. *Vide* 1 *Lev.* 56.

Note; At common law, all actions were laid in the proper county, that there might a jury *de vicineto*.

[669]

4. ANONYMOUS.

[Mich. 10 Will. 3. B. R.]

Where evidence necessary to support the action arises in two counties, the plaintiff may lay it in either. Vide infra. 7 Co. 2, 3, & 7, b. Raym. 33. 1 Lev. 178, 207, 394.

IN an *action on the case* against the drawer of a bill of exchange who lived at *Bristol*, and drew the bill there, a motion was made to change the *venue*, but it was denied, for the person upon whom the bill was drawn lived in *London*, and there was the refusal, and that must be proved to make the first drawer liable; for where evidence necessary to support the action arises in two counties, the plaintiff may chuse which he will; and this is the ground of the rule, that if the plaintiff will be bound to give some material evidence in the county where the action is laid, the Court will never change the *venue*. *Et Pasch.* 10 *W.* 3. *B. R.* in trover and conversion the defendant had leave to change the *venue*, and the plaintiff moved to set that aside, offering to be bound to give evidence in the county where the action was laid. Upon inquiry the Court found the plaintiff was assignee of commissioners of bankrupts, and could prove the assignment in that county. *Per Holt*, C. J. The whole is transitory. *Et per Cur.* The conversion is the cause of action, and not the assignment; and you are in place of the commissioners, and the *venue* was according to the rule. And, *Pasch.* 12 *W* 3. *B. R.*, it was held, that where a rule is made to change a *venue*, and afterwards the plaintiff would bring it back again, the rule must be, *dare aliquam evidentiam de materia in exitu*, in the county where the action was brought (*a*).

(*a*) When the *venue* has been changed upon the common affidavit from *Cumberland* to *London*, it cannot be brought back upon an affidavit that the cause of action was a promise to indemnify against becoming bail in *Scotland*, that the plaintiff's witnesses reside in *Scotland*, and are willing to come to *Carlisle*, but not further, and that there is no process to compel their appearance, *Foge* v. *Gale*, 1 *Wils.* 162.; nor on an affidavit that the cause of action arose where the *venue* is laid; there must be an undertaking to give material evidence there, *French* v. *Copinger*, *H. Bl.* 216.: Upon such an undertaking the plaintiff must be nonsuited, unless he gives material evidence accordingly, *Santler* v. *Heard*, 2 *Bl.* 1031.; but the undertaking is complied with by proving a subsequent rule to pay money into court in the county where the *venue* is, *Watkins* v. *Towers*, 2 *T. R.* 275., or by proving a cause of action in a foreign country, *Gerard* v. *De Rebeck*, *H. Bl.* 280.

After the *venue* has been changed from *M.* to *L.*, and the cause has gone down to trial at *L.*, and been made a *remanet*, it may be changed to *L.* upon the usual undertaking, *Bruckshaw* v. *Hopkins, Cowp.* 409.

5. DOMINUS REX *v.* THE MAYOR OF OXFORD (*a*).

[Mich. 13 Will. 3. B. R.]

IN *case* for a false return, the action was laid in *Suffolk*, and the defendant moved it might be laid in *Middlesex*; and gave as one reason, that it would raise heats in the county. The Court inclined to do it, but the plaintiff insisted and would not consent, and therefore nothing was done, because he had a right to lay it in either county (*b*).

Vide supra. Raym. 33. Lutw. 345. 5 Co. 2, 3, 4, & 7, b.

(*a*) *Qu. Orford.*

(*b*) In *Mylock* v. *Saladine*, 1 *Bl.* 480., 3 *Bur.* 1564., after a trial in the city of *Chester* for false imprisonment there, and a new trial granted, the Court changed the *venue* to the county of *Chester*, on account of its appearing that an impartial trial could not be had in the city. The usual rule, when an impartial trial cannot be had where the *venue* is laid, and the cause of action arose, is to try the cause in the next county, case of *The Mayor, &c. of Bristol*, 1 *Wils.* 77.; but the Court will not permit a suggestion that an impartial trial could not be had, to be entered, unless there appears a clear and solid foundation for it, *Rex* v. *Harris*, 3 *Bur.* 1330., 2 *Bl.* 378. If the next county is a county palatine, the *venire* is directed to the nearest county where the king's writ runs, *Rex* v. *Cowle*, 2 *Bur.* 861.; *Rex* v. *Amery*, 1 *T. R.* 363.

Vide Mayor of Poole v. *Bennett*, *Str.* 874.; *Mayor, &c. of Bristol* v. *Proctor*, 1 *Wils.* 298.

6. CROCKET'S *CASE.*

[Trin. 3 Ann. B. R.]

THE plaintiff declared of a promise in *Staffordshire*, and the declaration was delivered in *Easter-Term*. *Chetham* moved to change the *venue*. *Et per Holt*, C. J. (the motion being in *Trinity-term*,) Unless it appears upon the face of the declaration, that the plaintiff was not entitled to a plea to enter, we expect an affidavit when the declaration was delivered, that thereby the Court may be ascertained. [670]

S. C. 6 Mod. 175.

7. SIR SAMUEL GERARD'S *CASE.*

[Mich. 3 Ann. B. R.]

AN action of false imprisonment against the sheriffs of *London* was laid in *Middlesex*, and upon the common affidavit a rule was made that the *venue* should be changed

Vide 1 Saund. 229. Raym. 33. Str. 874.

to *London;* but then it was said that the officer of the Counter was subject to the sheriffs, and so there could be no good trial, for which reason it was removed back to *Middlesex* (*a*).

(*a*) Where the *venue* has been changed upon the common affidavit, and it appears that an impartial trial cannot be had, as in a city on a bye-law of that city, or in a county upon an action for words spoken in the heat of an election, the rule for changing it will be set aside, and it cannot be changed to an adjacent county where the cause of action did not arise, *Slaughter* v. *Bradock*, 4 *Bur.* 2447.; *Petyt* v. *Berkeley*, *Cowp.* 510.

8. HEATHCOAT'S *CASE.*

[Pasch. 4 Ann. B. R.]

Venue not changed in action against a lighter-man, &c. for goods lost. Vide 1 Lev. 307. 1 Sid. 87.

AN action against a lighterman for not delivering goods, was laid in *London*, where they were to be carried. It was moved to change the *venue*, because the damage and neglect was in *Kent; sed non allocatur;* for the neglect is transitory, and not material where it was, and the Court will never change a *venue* for a carrier, which is the same case; otherwise perhaps in deceit, or where there is an actual misfeasance. *Sed per Holt*, C. J. *Mich.* 10 *W.* 3. *B. R. fuit dit*, that, in an action of escape, it is not the course to change the *venue* (*a*).

(*a*) An affidavit to change the *venue* from *L.* to *C.* must state that the cause of action arose in *C.* and not in *L.*, or elsewhere out of *C.*, and is insufficient if it omits *not in L.*, *Allen* v. *Griffiths*, 3 *T. R.* 495. *Vide Waddington* v. *Thelwell*, 4 *Bur.* 2452.; *Herring* v. *Durant*, 1 *Wils.* 178.

The courts will not change the *venue* in an action on a libel in a newspaper which is circulated and sold in different counties, *Pinkney* v. *Collins*, 1 *T. R.* 571.; or in a letter sent from one county to another, *Clissold* v. *Clissold*, *id.* 647.; *secus* when it is contained in a letter sent from one place to another in the same county, *Freeman* v. *Norris*, 3 *T. R.* 306.; or from the county into which the *venue* is attempted to be changed, to a place abroad, *Metcalfe* v. *Markham*, 3 *T. R.* 652.

It is not in general changed in debt or an action on a specialty, or bill of exchange, or promissory note, *Str.* 878. *Barnes* 491. 1 *Wils.* 41.; but in an action on a bond the *venue* was changed to the county where it was sworn that the plaintiff's and defendant's witnesses lived, *Foster* v. *Taylor*, 1 *T. R.* 781; but in *Pole* v. *Horobin*, *n. ibid.*, the Court refused in a similar action, to change it to where the defence arose, with an offer to admit the execution of the bond; or from *G.* to *S.* in an action for running down a ship, the defendant's witnesses living in *S.* and the plaintiff's in *G.*, *Fleke* v. *Godfrey*, *id. ibid.* That the action arose on a wager laid in *O.* respecting an event in *C.* is not a sufficient cause against changing the *venue* from *M.* a third county to *O.*, *Shirly* v. *Collis*, 2 *Bl.* 940. *Vide French* v. *Copinger*, *H. Bl.* 216. *n.* to *pl.* 4. *ante.*

Whether a *venue* can be changed into *Wales* appears to be still undecided. There have been many rules for the purpose made absolute without opposition, *vide Pritchard* v. *Pugh*, *Doug.* 262.; but on account of the

necessary form of the affidavit, it cannot be changed into the next *English* county, though the cause may be tried in such county; *vide Waddington* v. *Thelwell*, 4 *Bur.* 2450.; *Moore* v. *Fernhaugh*, 1 *Wils.* 138.

It cannot be changed into one of the four northern counties before the spring assizes, *dict. ibid. Vide acc.* 3 *Bl. Com.* 294.

It may be changed into a county palatine, *Godfrey* v. *Philpot*, 2 Lord *Raym.* 1418.; *Markham* v. *Norton*, cited 1 *Wils.* 222.

9. KNIGHT *v.* FARNABY & AL.

[Pasch. 5 Ann. B. R. 2 Ld. Raym. 1253. S. C.]

Clerk of assize may lay his action in Middlesex, and the venue shall not be changed. 1 Lev. 207. 1 Mod. 37, 64. 1 Saund. 247. 6 Mod. 82. 1 Sid. 326. 5 Mod. 223. S. C. Holt 712.

Practice of changing the visne in transitory actions began in K. James the First's time.

MR. *Knight*, clerk of assize of the *Norfolk* circuit, brought an action of assault and battery against *Farnaby* and others, for a battery committed in *Kent*, and laid the action in *Middlesex*. Upon the common affidavit the *visne* was changed, and, upon the motion of Mr. *Knight*, that rule was set aside, and the *visne* brought back again (*a*). *Et per Holt*, C. J. In strictness of law, an action for a transitory matter, as battery is, may be laid any where. If by law the place were material, the defendant might give in evidence, as he does in criminal prosecutions, that the battery was done in another county: However it is now allowed and become the course of the Court, to change the *venue* for the defendant upon the common affidavit; a practice which, as he had heard by old practisers, came up first in King *James* the First's time; but that rule had never obtained in cases of privileged persons, as barristers, &c., who are to attend at *Westminster;* and therefore have the liberty of laying their actions in *Middlesex:* So it was held in the case of Mr. *Thompson* against *Scroggs*. The plaintiff is an officer, he is bound to attend the assizes at *Norfolk*, and to attend at *Westminster* to return the *postea's*. By the statute of *Westminster justiciarii habeant clericos suos irrotulantes;* and in *Dyer*, upon a question who should return the *postea's* in case both the justices of assize died before the day in bank, it was held the clerk of assize should return them: Therefore he is clerk to the judge of assize, and a minister here above to attend upon trials ordered by superior courts, upon writs of *nisi prius* issuing out of those courts. *Et per Powell*, J. The privilege extends to judge's clerks, as well as to serjeants at law, barristers, and attornies, for they are bound to be in *Middlesex* to attend their masters, and so is the clerk of assize; that the clerk of assize was the clerk of the judge of assize; and since the statute has allowed the judge of assize to have a clerk, they shall not be obliged to return the *postea's* themselves, but the clerk of assize shall attend at *Westminster* to return them.

[671]

Clerks of assize are by stat. Westm.

(*a*) *R. ac. Bur.* 2027. *Bl.* 1065. *Vide* 1 *Wils.* 159. *Str.* 822.

UNIVERSITIES AND SCHOOLS, &c.

Vide ante 450. S. C. Cases B.R. 165. Skin. 665.

1. HINTON v. HERN.

[Mich. 8 Will. 3. B. R.]

Vice-Chancellor's Court cannot hold plea for a penalty of a statute. Gilb. C. B. 195. 14 H. 4. 20.

HINTON was libelled against in the University-court of *Oxford*, reciting the statute of *E.* 6. and *Car.* 2. And the custom of the university to have but four taverns, and that he sold wine without their licence, in contempt of the laws of the university and the said statutes; and because a penalty is inflicted by the said statutes, and they cannot hold plea for such penalty, a prohibition was granted.

[672]
S. C. ante 412.

2. MATTHEWS v. BURDETT.

[Hill. 1 Ann. B. R.]

Argued whether a prohibition lay to the Ecclesiastical Court in a suit for teaching school without licence from the ordinary before the act for preventing the growth of schism. Quære. S. C. Salk. 318.

IN a *prohibition* the plaintiff declared, that whereas by the common law it was lawful to teach others, and instruct them in any honest way of science, and that teaching *est res mere laica, &c.*; yet that he was sued in the Spiritual Court for teaching children in the elements of grammar, without licence from the ordinary. On demurrer it was insisted for the plaintiff,

Ld. Raym. 5. 1 Bl. Com. 471. 1 P. Wms. 29. Str. 1056. Rep. B. R. Temp. Hard. 326. 4 Vin. Abr. 320.

1st, That the law favours means of livelihood; that grammar was equally useful to all literate professions, and that a lawyer or physician could be no more without it than a divine. That all the colleges in the university were lay corporations; that though the members of the college might be all of them *spiritual persons*, yet the corporation was lay and temporal; because the institution and end was temporal, *viz.* to advance learning, which shews that a schoolmaster is a lay employment, and was formerly under the care of the civil magistrate. *Stillingfleet's Orig. Brit.* 210, 212, 213. That the common law takes no notice of it but as temporal. *Vide* 11 *H.* 4. 47. *Poph.* 170. *Reg.* 35. And that the only mention of it before the Reformation, is *anno Domini* 1408. *Per Lyndewode* 282. That schoolmasters permit not their scholars to dispute of religion, under penalty of being censured for heresy, to which every body was liable; which provision was to prevent the spreading of *Wickliff's* doctrine. That no law or canon required a licence till the

Council of *Lateran*, *anno Domini* 1215. *Decret.* 6. *Tit.* 5. *cap.* 1, 2, 3. and that is, that there shall be a school-master in every cathedral, and that he shall be licensed by the bishop. That the several acts of parliament which require the schoolmaster's taking a licence from the bishop, shew it was not necessary before, nor was there any such usage or practice that can be made appear. *Vide stat.* 23 *Eliz. c.* 2. 1 *Jac.* 1. *c.* 4. 14 *Car.* 2. *c.* 4.

2dly, That if this was a calling which a layman might follow by the common law, a canon cannot restrain him of the liberty the law gave him; the common law and custom of the realm cannot be altered or abrogated, but by act of parliament, and therefore a canon cannot do it, though ordained by the king's royal licence, or afterwards confirmed by his royal authority. *Vide* 12 *Co.* 72. 2 *Inst.* 97, 647, 653, 657. 2 *Ro. Ab.* 454. *Mo.* 782. *Ratio est*, because being a layman, he is not represented, and therefore his consent is not given, and a man cannot be under the obligation of a canon without his consent express or implied. In the primitive church the laity were present at [673]
all synods. When the empire became christian, no canon was ever attempted without the consent of the emperor; and his concurrence included the assent of the whole body of the people; because he had the sole legislative power in him: But this is not the case of our king; for he has not the whole legislative power in him; *ergo*, his consent to a canon *in re ecclesiastica*, makes it a law to bind the clergy, but not to bind the laity. *Vide* 20 *H.* 6. 13. *Br. Ordinary* 1. 2 *Ro. Ab.* 226. 2 *Cro.* 670. 2 *Brownl.* 38. *Cro. Car.* 589. *Palm.* 379.

3dly, Where the common law or statute gives a remedy 3 Salk. 318.
in foro sæculari, whether the matter be temporal or spiritual, the conusance of that matter belongs to the king's temporal courts only, unless the jurisdiction of the Spiritual Court be saved by that statute which gives the penalty; for otherwise one might be twice punished for the same thing (*a*). *Vide Lit. sect.* 136, 137. *Cro. Car.* 229. 1 *Mod.* 21, 22. 1 *Jon.* 320. Where a crime which was punisha- Hob. 121.
ble in the Ecclesiastical Court, is made felony, their jurisdiction is gone. For *nota;* The nature of the crime is altered. So 2 *Leon.* 53. 4 *Leon.* 92. That in this case the act of parliament which gives a temporal penalty, does not save the jurisdiction of the Spiritual Court; which was urged as an argument that the parliament did not look upon it as an ecclesiastical matter; for in all cases where acts of parliament have imposed far-

(*a*) It is not in *Littleton*, but in Sir *Ed. Coke's Commentary*, 96, *b.*, that this doctrine is laid down, which is supported, *Fortesc.* 345. 2 *Wils.* 79.

ther penalties in ecclesiastical offences, there is a saving added for the jurisdiction of the Ecclesiastical Court; so is 13 *Eliz. cap.* 5. of usury; 31 *Eliz. c.* 6. of simony; 4 *Jac.* 1. of drunkenness; 3 *Car.* 1 *c.* 1. of the observation of the Sabbath; 3 *J.* 1. *c.* 4. of recusancy. And they urged also that these parliaments had not added these savings, if they had been useless; but it was their opinion, that imposing a penalty made it a temporal offence, and that their jurisdiction would have been lost without such a saving. And lastly, this difference was taken, that where an act of parliament gives a remedy for a spiritual matter in the temporal courts, the spiritual jurisdiction is gone; but where an act gives a remedy in a temporal matter to be prosecuted in the Spiritual Court, yet the remedy at common law remains, as *pro violenta injectione manuum in clericum. Note;* In the statute *de circumspecte agatis*, the words are, *commissum fuit alias;* which must be understood of a jurisdiction before granted to them.

On the other side it was said, that the canon of *Lateran*, before mentioned, was received in *England* as well as the other canon of the same council for parochial tithes, and that it appears by custom, that the bishop is to superintend the education of youth. *Vide Lindw. l.* 5. tit. *De Magistris*, and the several statutes, requiring that he shall have a licence from the ordinary: And it was said, that the toleration act did not influence this case, for that did not exempt men in places of trust from qualifying themselves according to the rites of the church of *England*.

Vide 12 Ann. Sess. 2. c. 7. s. 5.

[674]

Vide 3 Cro. 64, 65. 5 Co. 119. 2 Lev. 184, 243.

VOID AND VOIDABLE.

1. HALL *v.* BIGGS.

[Trin. 2 W. & M. B. R.]

Where an order of justices is not void but voidable.

IN *debt on a bond*, with condition to stand to and perform the order of the justices, the defendant pleaded they made no order; the plaintiff replied and set forth the order. The defendant demurred; pretending it was a void order, and that he was not bound to perform it, comparing it to the case of an award; but the Court did

not think them alike; for the order being a judicial act is not absolutely void, but voidable, and continues an order till avoided (*a*).

(*a*). *Vide Rex* v. *Inhabitants of Stotfold*, 4 *T.R.* 596.

2. PRIGG *v.* ADAMS & AL.

[Mich. 4 W. & M. B. R.]

IN *trespass and false imprisonment*, the defendant justified as an officer under a *ca. sa.* on a judgment in the Court of Common Pleas upon a verdict for 5*s.* for a cause of action arising in *Bristol*. The plaintiff replied, and set forth the private act of parliament for erecting the Court of Conscience in *Bristol*, wherein was a clause, that if any person bring such action in any of the Courts at *Westminster*, and it appeared upon trial to be under 40*s.* that no judgment shall be entered for the plaintiff; and if it be entered, that it shall be void. Upon demurrer, the question was, Whether the judgment was so far void, that the party should take advantage of it in this collateral action? And the Court held that it was not; but that it was only voidable by plea or error; as where one is taken on outlawry and hath no addition; (*vide* 7 *H.* 5. *c.* 5. 8 *H.* 6. *c.* 10. *Bend.* 14, 88, 122, 132. 1 *Inst.* 259. *Dy.* 214. 5 *Co.* 119.) and said it was not like the case of a judgment vacated. 2 *Sid.* 225.

Judgment of a superior Court is only voidable. Vide 2 Lev. 184 & 243. 3 Lev. 23. S. C. Carth. 274. Skin. 350, 366, 407. Holt 182.

2 Sid. 125. Raym. 73. 2 Inst. 184.

3. THOMPSON *v.* LEACH.

[Hill. 9 Will. 3. B. R.]

S. C. ante 427, 576.

BOND of an infant (*b*) or *non compos* is void, because the law has appointed no act to be done to avoid them; and the only reason why the party cannot plead *non est factum*, is, because the cause of nullity is extrinsic, and does not appear on the face of the deed (*c*).

Bond of an infant, or non compos, is void. Vide Samuel v. Evans, 2 T.Rep. 575.

(*b*) The deed of an infant, which takes effect by delivery, is not void, but that of a feme covert is: The comparison between an infant and a *non compos* is not just. See this subject very fully discussed in *Zouch ex dem. Abbott* v. *Parsons*, 3 *Bur.* 1794.; but an infant's warrant of attorney is void, *id. Sanderson* v. *Marr*, *H. Bl.* 75.

(*c*) It may be given in evidence on *non est factum*, *Str.* 1104.

Vide ante 590.
Lutw. 824.
Vaugh. 50.

USES AND TRUSTS.

S.C. 4 Mod. 153. 5 Mod. 143. Judgment affirmed. Show. Par. Ca. 104.

Husband and wife covenant to levy a fine of the wife's land to the use of the heirs of the body of the husband on the wife begotten, the limitation is void.

Q. 5 Mod. 153. S.C. Carth. 262, 254. 3 Cro. 334. 1 And. 328. 4 Leon. 293. 1 Vent. 72. 4 Mod. 580. 1 Vent. 272. 2 Lev. 75. Holt 730. Skin. 351. Cases B. R. 38. 1 Mod. 98, 121, 130, 237. Vide Butl. Co. Lit. 216. n. 2.

1. DAVIES *v.* SPEED.

[Hill. 3 W. & M. B. R. Rot. 261.]

HUSBAND seised in right of his wife: Husband and wife covenant to levy a fine to the use of the heirs of the body of the husband on the wife begotten, remainder to the right heirs of the husband. They have issue, the wife dies, the issue dies, and the husband dies; and now the question in ejectment was, Whether the heir of the husband, or the heir of the wife, should have the lands. *Et per Cur.*

1st, Here can be no estate for life to the husband by implication; because the estate was the wife's, to which he is a stranger.

2dly, This limitation to the heirs of the body of the husband, *&c.* was merely void; for taking it as a remainder, there is no precedent estate of freehold to support it; and taking it as a springing use, then it is a springing executory use, to arise after a dying without issue, which the law will not expect; so that it is either way void, and yet must be one of them (*a*): But in this case the Chief Justice held, that a feoffment to the use of *A.* and his heirs, to commence four years from thence, was good as a springing use, and that the whole estate remained to the feoffor in the mean time; so it is if it were to commence after the [676] death of *A.* without issue, if he die without issue within twenty years.

(*a*) Supposing an estate for life in the wife by implication or resulting use, capable of supporting the use to the heirs of the body of the husband on the wife, yet as she, as well as their issue, died in the husband's life-time, before the limitation to *his right* heirs could vest, *that* must have failed as a contingent remainder, for want of a subsisting freehold estate at his death to support it. *Fearne* 409. (210.) With respect to the point, that the estate could not result to the husband, *vide ac.* Sir *T. Tipping*'s case, cited 1 *P. Wms.* 359. *Jenk. Cent.* 248. *c.* 18. *Fearne* 68. *Saunders on Uses*, 178. From the nature as well as the context of this case, and the report in *Shower*, it evidently appears that the question did not relate to the limitation to the heirs of the body, *&c.* but on the subsequent limitation, which (*vide Show. & Fearne*) was not to the husband in fee, but to the right heirs of the husband. The limitation to the heirs of the body was not after a dying without issue.

2. LD. ANGLESEY *v.* LD. ALTHAM.

[Pasch. 8 Will. 3. B. R. Gilb. Rep. 16. S. C.]

Upon the trial of this cause at *nisi prius* in *Middlesex*, before *Holt*, C. J. a case was made for the opinion of the Court, *viz. H.* levied a fine and afterwards suffered a common recovery, wherein the conusee was tenant, and there being no deed in the case, it was objected, that the use of the fine resulted to the conusor; and though the intent of the fine might be to make a tenant to the *præcipe*, yet no use or trust can be averred since 29 *Car.* 2. *c.* 3. *Sed non allocatur*; for at common law the use was always intended to be to the feoffee or conusee, and in pleading never was averred. *Co. Ent.* 114, 273. *Plowd.* 477. But if it be to the use of the feoffor or conusor, then it must be averred (*a*).

Fine levied and common recovery suffered, wherein conusee was tenant, and no uses of the fine declared. Intended to be to the use of the conusee, in order to make a tenant of the freehold. Vide infra, & prox. pag. Lutw. 273. 2 Vent. 361. S. C. Rep. Eq. 16. Rep. A. Q. 210. 1 Vern. 367. Holt 733, 736. Pigott 52. 2 Cruise 28. Doug. 24.

2dly, The Court held the party was in by the fine immediately, and so there was a good tenant to the *præcipe* (*b*).

3dly, The statute extends not to uses by operation of law, but to such uses as are to a third person, and that neither the conusor nor the conusee could aver the fine to the use of a third person since the statute.

(*a*) Per Ld. *Mansfield*, *Roe* v. *Popham*, *Doug.* 24.: The presumption is, that the fine is levied to the use of the conusor, which is liable, like all other presumptions, to be encountered by contrary evidence. *Vide Saunders on Uses*, 137.

(*b*) *R. acc.* 1 *Str.* 17.

3. TREGAME *v.* FLETCHER.

[Hill. 8 Will. 3. B. R. 1 Ld. Raym. 154. S. C.]

ERROR of a judgment in the grand sessions of *Wales*, in replevin, where the defendant made conusance, that *A.* was seised in fee-tail, and suffered a common recovery; and that by deed made at a time subsequent, it was agreed the recovery should be to the use of *B.* for the security of a rent-charge; and that rent was arrear, for which he distrained. Judgment was for the avowant. *Holt*, C. J. held, 1st, That it was not well to plead the uses were declared by a subsequent deed; but he should plead, *quod recuperatio habita fuit, &c. quæ quidem recuperatio in forma prædict. habita fuit* to such and such uses.

Where the uses of a recovery are declared by a deed subsequent, the pleading should be general, that the recovery was to such uses. Vide prox. pag. Where uses may be averred by parol, and where not. Vide 1 Salk. 75. 2 Co. 77. Lutw. 273. 1 Sid. 160. 6 Mod. 82. 1 Lev. 113.

2dly, He held, that where the uses of a recovery are declared by deed precedent, no new or other use can be averred by parol, unless there was some variance between

2 Vent. 242. S. C. 3 Salk. 302. Comb. 40. 9 Co. 10. Quære, If the conuzor or heir at law can aver it to other uses? Cases in Parl. 195, 145. Comb. 430.

the deed and the recovery; and that in case of a deed precedent, if the party set up other uses, he must confess and avoid: But where they are by deed subsequent, new or other uses may be averred without shewing the deed, though there be no variance, &c., because there was an intermediate time when there might be such agreement made, and the uses arise by the recovery according to that agreement; and if a deed subsequent be set up, the other may traverse those uses. *Adjournatur.*

[677]

4. JONES *v.* MORLEY.

[Hill. 9 Will. 3. B. R. 1 Ld. Raym. 287. S. C. Comyns 29. S. C.]

Where a conveyance to uses enures by way of transmutation of possession, the uses may be declared or revoked without deed. Vide 2 Lev. 77. 1 Co. Rector of Chedington. S. C. Carth. 410. 4 Mod. 261. 2 Lev. 149. 2 Keb. 366. Raym. 239. 1 Vent. 278, 368. 2 Rol. Abr. 749. 2 Rep. 71. b. 1 And. 126. Dyer. 309. 1 And. 240. Moor 789. 2 Rol. Abr. 251. Bridg. 112. S. C. Comb. 429. Cases B. R. 159. Holt 321. 5 Co. 25. 1 Atk. 2. Saunders on Uses 213.

UPON a special verdict in ejectment it was found, that *Bowyer* being seised in fee, in consideration of marriage, by indenture of lease and release conveyed to *A.* and *B.* to the use of herself in fee, till the intended marriage with *Edward Morley* should take effect, and until the said *Morley* should settle upon her a jointure of 300 *l. per annum*, and then to the said *Morley* and his heirs: The marriage took effect, and on the 29th day of *January* 1665, they covenanted and agreed to levy a fine next *Hilary term;* and the use thereof was declared by the same deed to be to *E. Morley* and his heirs. Afterwards, *viz.* the 31st day of the same month, by indenture between husband and wife, it was agreed and declared, that the uses of the deed of the 29th should be revoked. After this, the same *Hilary term*, a fine was levied; and this writing of the 31st being no deed, it was resolved,

1st, That by the agreement of the 29th, the parties meant a fine to be levied *Hilary term* come twelve months, and not the *Hilary term* then current, and therefore this fine was not pursuant to that covenant.

2dly, That if the fine had been levied pursuant to that covenant, no parol averment could have beeen allowed to declare other uses, or that the fine was not to the uses of that deed, and all parties had been estopped to aver the contrary by parol; but by deed subsequent, and before the fine, other uses may be averred.

Carth. 412. Comb. 430.

3dly, That since the fine is not according to the deed, other uses may be averred, though they were declared by writing, and not by deed; for by the variance there is room and occasion given to inquire and receive information, that the old agreement was relinquished; and by the same reason the use of a fine may be declared by parol upon an original agreement, it may now, as in this case, where the original agreement was relinquished: Yet with-

out such averment the fine shall be intended to the use of the first agreement, notwithstanding the variance.

4thly, That this is a good revocation of the uses of the first deed, though it be but a writing; for where the conveyance enures by way of transmutation, the use is according to the intent of the party, and it is no matter how that intent is manifested, so as it may be known; but where the conveyance is by way of covenant to stand seised, there must be a valuable consideration, or a binding agreement by deed (*a*).

Plowd. 301. Gilb. on Uses 45. Carth. 412. Lutw. 1248. 1 Sid. 26, 82. A use shall not be raised for natural affection without deed. Mo. 688.

(*a*) The judgment in this case was affirmed in the House of Lords, *Show. Pa. Ca.* 140.

5. SHORTRIDGE *v.* LAMPLUGH.

[678]

[Mich. 1 Ann. B. R. 2 Ld. Raym. 798. S. C.]

S. C. Faresl. 71. 3 Salk. 386. Holt 621. Vide post. pl. 7.

If a lease and release be pleaded to A. and his heirs, and no consideration appears, nor said to whose use it was, it shall be intended to be to the use of the releasee and his heirs. Dyer 146.

H. BROUGT covenant as assignee of a reversion, and shewed, that the lessor, in consideration of 5*l.* bargained and sold to him for a year, and afterwards released to him and his heirs, *virtute quarundam indentur. bargainæ venditionis & relaxationis necnon vigore statuti de usibus, &c.* he was seised in fee. And it was objected, that the use must be intended to be to the relessor and his heirs, because no consideration of the release nor express use appeared by the pleading; so that without considering the operation of the conveyance, the question was upon the pleading, Whether the use shall be intended to the relessor, unless it be averred to be to the relessee? *Et per Holt*, C. J. to which the rest agreed.

This way of pleading was certainly good before the statute 27 *H.* 8. so is *Plowd.* 478. and many precedents in *Co. Ent.* of feoffments averred in the same manner; for the use was a matter that was extrinsical to the deed, and depended upon collateral agreements at *common law*, and then the use might, *as since the statute of frauds by writing*, be averred by parol, and therefore in pleading the conveyance was taken to the use of him to whom the conveyance was made, till the contrary appeared; if it were otherwise, it ought to come on the other side; and 27 *H.* 7. has not altered the course of pleading, which is rather confirmed by the statute; because, if now the use be construed to be to the relessor or feoffor, the conveyance will be to no manner of purpose, it being still the old estate to which the old warranty and other qualities remain annexed; whereas before the statute there might be some end in making the feoffment, *viz.* to put the freehold out of him and prevent wardship; and *Co. Lit.*

Vide Hob. 20. 2 Wils. 19. Saunders on Uses 128—138. 2 Atk. 148. Co. Lit. 271.

goes no farther, than where there is a feoffment to particular uses and estates, the residue of the use shall be to the feoffor, which is reasonable; for the raising those particular estates appears a sufficient reason for the conveyance. And *Powel*, J. doubted, whether there could be a resulting use on a lease and release, unless, where particular uses are limited; for this way of conveyance is grounded on the ancient way of releasing at common law, wherein there was a merger of estate, which is a good consideration, as where the lessor confirms to the lessee and his heirs. In error of a judgment of *C. B.* which was affirmed.

Q. Whether there can be a resulting use upon a conveyance by lease and release? Vide 1 Lev. 30. 2 Lev. 77.

[679]

Vide 1 Chan. R. 176. Lutw. 823.

6. BROUGHTON *v.* LANGLEY.

[Hill. 1 Ann. B. R. 2 Ld. Raym. 873. S. C.]

Devise to trustees and their heirs, on trust to permit A. to take the profits for his life, and afterwards to stand seised to the use of the heirs of A's body, is a use in A. and he has a tail. S. C. Eq. Abr. 383. p. 3. 1 Lutw. 814. Holt 708. 2 Vent. 311, 312. Whatever was or would have been a trust at common law, is since the statute of uses executed. 1 Vent. 232.

ONE seised of lands in fee, devised them to trustees and their heirs, to the uses, intents, and purposes herein-after mentioned, *viz.* to the intent and purpose to permit *A.* to receive the rents and profits for his life, and after that the trustees should stand seised of the premises to the use of the heirs of the body of *A.* with a proviso, that *A.* with the consent of his trustees, might make a jointure for his wife; and the question was, Whether *A.* had an estate-tail executed, or not? And it was adjudged he had, (*a*). *Holt*, C. J. pronounced the judgment of the Court, and gave these reasons: 1st, That this would have been a plain trust at common law, and what at common law was a trust of a freehold or inheritance is executed by the statute, which mentions the word *trust* as well as *use;* and the case in 2 *Vent.* 312. *Burchet* and *Durdant*, is not law; and that the change of expression in the principal case by using the word *permit* in the first clause, which are words of trust, and afterwards making mention of a use, is immaterial, in regard trusts at common law and uses are equally executed by the statute.

2dly, It was held, That a power to make a jointure, does not necessarily exclude an estate in tail, or an intent to give it; because tenant in tail, without discontinuing or barring the tail, cannot make a jointure; and so this power has its use.

(*a*) Where an estate is devised to one for the benefit of another, the Courts execute the use in the first or second devisee, as appears best to suit with the intention of the testator, *Butl. n. Co. Lit.* 271. *b.* under 378. *a.* The use vests in the trustees on a limitation to pay over the rents and profits, *Symon* v. *Turner, Eq. Ab.* 382.; *Bush* v. *Allen*, 5 *Mod.* 63.; *Nevil* v. *Saunders, id.*, and 1 *Vern.* 415.; *Jones* v. *Lord Say and Seal, Eq. Ab.* 382. 8 *Vin.* 262. 3 *Bro. P. C.* 458; *Shupland* v. *Smith*, 1 *Bro. Ch.* 75. *Silvester ex dem. Law* v. *Wilson*, 2 *T. R.* 44. 2 *Bl. Com.* 336.; *Saunders on Uses*, 231.; *Vide Bagshaw* v. *Spencer*, 1 *Vez.* 142.

7. ADAMS v. TERTENANTS OF SAVAGE.

[Hill. 1 Ann. B. R.]

S. C. 1 Salk. 40. & ante 601. 2 Ld. Raym. 854.

Lease and release by A. to trustees and their heirs to the use of A. for 99 years, remainder to the use of the trustees for 25 years, remainder to the heirs male of A.'s body: remainder to his right heirs, is void, for want of a freehold.

1 Chan. Rep. 239. 6 Mod. 134, 199, 226. 3 Salk. 321. Holt 179. Lilly Ent. 398. Mod. Cas. 134, 199, 226. Faresl. 15.

IN a *scire facias* on a judgment against tertenants, it was found by special verdict, that one *Savage* being seised in fee, conveyed by lease and release to trustees and their heirs, to the use of himself for 99 years, remainder to the heirs male of his own body, remainder to his own right heirs; the question was, Whether *Savage* was tenant in tail, or only tenant for years? And the Court held the limitation to the heirs male of the body to be void, because there was no preceding estate of freehold limited to support it; and it shall not be implied contrary to the intent of the conveyance; and if it could be implied, it must be out of the estate given to the heirs of the body, which cannot be, because this is a new use; whereas a resulting use is always from the old estate, and parcel of the old use; and here the estate takes effect by transmutation of possession out of the seisin of the trustees; and not like *Fenwick* and *Mitford's* case (*a*), where the owner covenanted to stand seised to the heirs of his body. And yet *per Powell*, J. Even in that case, if there had been an express estate limited to the covenantor, it had been otherwise (*b*).

[680]

(*a*) The case alluded to is *Pibus* v. *Mitford*, 1 *Vent.* 372.

(*b*) *Vide Pibus* v. *Mitford*, 1 *Vent.* 372.; *Penhay* v. *Harrell*, 2 *Vern*, 370.; *Rawly* v. *Holland*, 5 *Vin.* 189. 2 *Eq. Ab.* 753.; *Tippin* v. *Cosin*, *Carth.* 272. 4 *Mod.* 380.; *Fenwick* v. *Mitford*, *Moor* 284.; *Else* v. *Osborne*, 1 *P. W.* 387.; *Southcott* v. *Stowell*, 1 *Mod.* 226. 2 *Mod.* 207.; *Wills* v. *Palmer*, 5 *Bur.* 2615. 2 *Bl.* 687.: The general conclusion from which is thus stated by Mr. *Fearne*: "The inference afforded by the several cases seems to be, that when the use is not limited away *during the whole* life of the grantor, and there is an use limited which cannot commence till after his decease, (as is the case of a limitation to the heirs of his body taken by itself,) whether that use be limited in the first instance, (as in *Pibus* v. *Mitford*,) or be preceded by limitations for terms of years, (as in *Penhay* v. *Harrell*,) or by uses of the freehold or inheritance that may determine in the grantor's life, (as in *Wills* v. *Palmer*,) the use results to the grantor for life, immediately in the first case, and in remainder expectant on the preceding uses in the other, where there is no express use limited to the grantor himself, inconsistent with such an implication." *Vide Butl.* 2 *Co. Lit.* 216. *a.*

8. PYE *v.* GEORGE.

[Mich. 9 Ann. In Canc. S. C. 1 Wms. 128. Prec. in Ch. 308, 1 Eq. Ca. Ab. 384.]

Trustees join to bar a contingent remainder, it is a breach of trust. Cro. Car. 312. 1 Chan. Rep. 28, 296.

TRUSTEES appointed to preserve contingent remainders did join in a conveyance to destroy the remainder before a son was born; and this was decreed a plain breach of trust; and that whoever claimed under this conveyance, having notice of the trust, or by a voluntary settlement, should be liable to make good the estates. *Per Harcourt*, Lord Keeper (*a*).

(*a*) *Vide* the statement of this case, 1 *Bro. P. C.* 366. the decree was affirmed in the House of Lords.

It was ruled in *Mansell* v. *Mansell*, 2 *P. Wms.* 678. *Temp. Talb.* 252., that the devisee of tenant for life, to whom the trustees for supporting contingent remainders had conveyed the estate, should reconvey to the uses of the settlement.

In the case of *Platt* v. *Sprig*, 2 *Vern.* 303., the trustees were directed to join in a sale to pay off a mortgage prior to the settlement: So in *Basset* v. *Chapman*, 1 *P. W.* 358., in a conveyance for the benefit of the creditors of a person who had made a voluntary settlement: So where lands have been limited to the father for 99 years, *&c.*, remainder to trustees, *&c.*, remainder to the first and other sons in tail, remainders over, the Courts of Equity will direct the trustees to join in a settlement on the marriage of the eldest son, to preserve the estate in the family, and answer the uses originally intended, *Frewin* v. *Charleton*, 1 *Eq. Ab.* 386.; *Winnington* v. *Foley*, 1 *P. Wms.* 536.; but will never interpose for the purpose of enabling any of the parties to sell the estate, and disturb the original intention of the settler or devisor, *Davies* v. *Weld*, 1 *Vern.* 181. 1 *Eq. Ab.* 386.; *Townsend* v. *Lawton*, 2 *P. Wms.* 379.; *Symance* v. *Tattam*, 1 *Atk.* 613.; *Woodhouse* v. *Hoskins*, 3 *Atk.* 22.; *Barnard* v. *Lenge*, *Cox's* note 2 *P. Wms.* 684. 1 *Bro. Ch.* 534. *Ambler* 774. *Vide* Sir *Tho. Tippen's* case, cited 1 *P. Wms.* 359.; *Tipping* v. *Pigott*, 1 *Eq. Ab.* 365. *S. C.*, in which the Court refused to aid the heirs of *A.* against a subsequent settlement made by *A.* and the trustees, under a settlement in trust for *A.* for years, remainder to preserve, *&c.*, remainder to the first and other sons, remainder to the heirs of *A.* *Vide* also *Else* v. *Osborne*, 1 *P. Wms.* 387.

Mr. *Fearne* says, "It seems to be the safest way for trustees not to act, except in the clearest cases, without the direction of the Court. I should rather recommend to their attention the words of the Lord Chancellor in *Pye* v. *George*, (cited 2 *P. Wms.* 684.) "That it would be a dangerous experiment for trustees in any case to destroy remainders which they were appointed by the settlement to preserve;" as well as the observation of *Reynolds*, *C. B.*, in *Mansfield* v. *Mansel*, "That whatever the Court have done, or may do, under particular circumstances, yet they will never have it left to the discretion of a trustee to do it, *Temp. Talb.* 259." *F. C. R.* 493. *Vide Garth* v. *Cotton*, 1 *Vez.* 524, 546.

USURY AND EXTORTION.

Cro. Jac. 104, 509. Cro. Car. 283, 253. 1 Leon. 54. 1 Hawk. cap. 68 & 82.

1. DOMINA REGINA *v.* SMITH.

[Pasch. 4 Ann. B. R. 2 Ld. Raym. 1144. S. C. 3 Ld. Raym. Entries 47.]

4 Mod. 51, 379. Justices of peace have not jurisdiction upon the statute of usury.

INDICTMENT was at the sessions before the justices of the peace at *Hicks's Hall*, for usury, *contra formam statuti*, and judgment was against the defendant, upon which a writ of error was brought in *B. R.* and the judgment reversed; for the justices of the peace have no jurisdiction in this case (*a*).

(*a*) But for extortion they have, 2 *Hawk.* 40. They have not for perjury or forgery at common law; but for perjury upon the stat. 5 *Eliz.* they have.

2. DOMINA REGINA *v.* BAYNES.

[Pasch. 5 Ann. B. R. 2 Ld. Raym. 1199, 1265. S. C.]

Charge of extortion ought to be particular, and laid the defendant took it extorsive. S. C. 4 Mod. 31, 32. 6 Mod. 192. Holt 512, 514.

UPON a *certiorari* this order was removed, Whereas by complaint in writing at this sessions, exhibited to this Court against *R. B.* clerk of the peace, *R. B.* was charged with divers misdemeanors in his office, *viz.* that he exacted of one *A.* the sum of 5*s.* for a *subpœna*, and did compel one *B.* to pay him 9*s.* more than his due fee; and it doth appear upon evidence, that the said *R. B.* misdemeaned himself in his office by extorting of the said *A.* by colour thereof [681] 5*s.* more than was due, and of the said *B.* 9*s.* more than was due; this Court doth discharge and remove him from the said office of clerk of the peace.

Note: By 1 *W. & M. Sess.* 1. *cap.* 21. *sect.* 4. If any clerk of the peace do misdemean himself in his office, and thereupon a complaint and charge in writing of such misdemeanors be exhibited against him to the sessions, the sessions shall discharge him. It was agreed by all, that if here was not a charge of extortion against *R. B.* then he was not removed; for the justices have only a special authority to execute as the statute appoints, and the act shall be construed strictly, because it deprives the defendant of the benefit he has by *Magna Charta*, of being tried *per pares*. The justices of the Queen's Bench being divided, it was adjourned into the Exchequer-Chamber, where *Gould* and *Powys*, Justices, *Smith*, Baron, *Ward*, C. B. and *Trevor*, Ch. Just. of the Common Pleas, held this a good

charge of extortion, by reason of the *viz.* which particularizes the general charge, and incorporates what follows after it with what went before it. Cited 2 *Brownl.* 151. 1 *Vent.* 37. *West*'s *Preced.* 97, 130. 1 *Sid.* 91. 1 *Keb.* 357. *Holt*, C. J. *Powell*, and five more justices, *contra*. Before the *viz.* all was mere recital and also general, and no general charge is by law allowable in any case but barretry, which in its nature must consist of a heap and multitude of particulars; but that in this case it ought to be certain and positive; because he is charged with a misdemeanor, and ought to know what he is to answer to; he is not only to be fined, but to lose his freehold; and where a man is to lose any part of his property, he must have a certain charge against him; the act requires the cause of removal should be in writing, that the cause may appear, and that he may have the benefit of appeal; and these articles are in the nature of informations; that what went before the *videlicet* being only matter of recital, and a kind of title to the articles, the charge begins at the *videlicet*, and then it does not appear that these misdemeanors relate to his office. It is not said that he took those sums *extorsive* & *colore officii*, and a man cannot be charged for extortion without charging him with acting *extorsive*, which are words as necessary as *proditorie* & *felonice*. In this case *non constat* but 8*s.* was his fee. The charge should have been, either that 3*s.* was his fee; and that he *colore officii sui extorsive* took 8*s.*, or generally, that he *colore officii sui injuriose* & *extorsive* took 8 *s.* *pro feodo*, &c.

In convictions what appears upon evidence will not supply the defects of the charge.

Lastly, They held, that what followed upon evidence before the justices, does not help, because it is no part of the charge: And the order quashed. *Note:* This report is only of the effect of what was said in *B. R.*

Note: The stat. of usury is not pleadable to a bottomry-bill or bond, &c. 1 *Lev.* 54. 2 *Lev.* 7. 1 *Show.* 8.

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[682]

1 Leon. Case 340.
2 Leon. Case 143.
Cro. El. 790.
3 Leon. Cas. 55.
2 Inst. 45.

WAGER OF LAW

1. ANONYMOUS.

[Trin. 11 Will. 3. B. R.]

Method of performing wager of law. 2 Vent. 171.

ACTION *of debt* was brought on a by-law; the defendant waged his law, and a day was given upon the roll for him to come and make his law; and now upon

the last day of the term he came: and *Northey* for the plaintiff insisted, that if he swear falsely or rashly, and without reason, the Court is not bound to receive him to it, and prayed a day to speak to that point. *Sed per Holt*, C. J. We can admonish him; but if he will stand by his law, we cannot hinder it, seeing it is a method the law allows; and the defendant was set at the right corner of the bar, without the bar, and the secondary asked him, If he was ready to wage his law? He answered, Yes; then he laid his hand upon the book, and then the plaintiff was called; and a question thereupon arose, Whether the plaintiff was demandable, and a diversity taken where he perfects his law *instanter*, and where a day is given in the same term, and when in another term. As to the last, they held he was demandable, whether the day given was in the same term or another. Then the Court admonished him and also his compurgators, which they regarded not so much as to desist from it; accordingly the defendant was sworn, that he owed not the money *modo & forma*, as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him, were called over and each held up his right hand, and then laid their hands upon the book and swore, that they believed what the defendant swore was true. *Per Northey*, this will be a reason for extending *indebitatus assumpsits* further than before. *Holt*, C. J. We will carry them no farther. Bro. Nonsuit 1.

Note; This seems to be the case mentioned *pl.* 2. to have happened in *B. R.* about two years before, and not to be law.

2. MOOD *v.* THE MAYOR OF LONDON. [683]

[2 Martii 1701. At Guildhall Chamber.]

S. C. 1 Salk. 397. Holt 740, 369. Vide 2 Lev. 106.

Wager of law lies not in debt on a by-law, nor any action where a wrong is supposed. 1 Show. 75. 3 Keb. 337. 2 Lev. 142, 174. 9 Co. 87, 88. 1 Lev. 151. 2 Roll. Abr. 106.

IN *debt* for the penalty of a by-law the defendant waged his law, and it was over-ruled in the court of the Lord Mayor, and a commission of error sued out before *Holt*, C. J., *Ward*, Chief Baron, and other commissioners. *Et per Holt*, C. J. Debt on a by-law made by a corporation, is founded on the wrong of the party in not submitting to the order of the government of the corporation, and it arises from his contempt and disobedience, and in such cases no wager ought to be allowed: So it is in debt for an escape, for it supposes a wrong, and the action lies not against the executors: So it is in debt for substraction of tithes: So it is in debt against an executor on a *devastavit*, because it supposes a wrong, and therefore the same action lies not against the executor of the executor.

By common law, if a contract was secret and wanted witnesses, it was a privilege on the plaintiff's side as well as the defendant's; for if the contract was secret, the plaintiff had the privilege of putting the defendant to his oath. This appears from *Magna Charta*. *Nullus ballivus ponet aliquem ad legem manifestam, nec ad sacramentum simplici loquela sua sine testibus fidelibus.* Before this, the plaintiff, on his declaration upon bare affirmance, might make the defendant swear there was nothing due. At this day, if the plaintiff produce witnesses to prove his demand, the Court may put the defendant to wage his law; and in such case the defendant is not at liberty to cross examine, no more than where the plaintiff in a prohibition produces witnesses to prove his suggestion.

Wager lies in account if he received of the plaintiff, not of a stranger. And in detinue, whether his receipt was of the plaintiff or a stranger.

No wager lies but where the debt arises from a simple contract that is secret, and not where the action is founded on any thing that is notorious. In account, if the receipt was by the defendant, the defendant may wage, not if by the hands of a third person. It is true, the law is otherwise in detinue on a bailment; for though the bailment was by the hands of a third person, the defendant may wage his law; but here the bailment is not traversable, but the detainer, and that is the point of the action, and the redelivery might be private.

In debt sur arbitrament.

In debt on an arbitrament, (*I intend where the submission is by a parol,*) the defendant may wage his law; because, though the arbitrators, who are strangers, are concerned, yet the submission might be secret; and that is the foundation from whence the debt arises.

In debt for an amerciament in a court-baron. But not on a judgment in a court-baron. 2 Mod. 140. 2 Vent. 171.

In debt for an amerciament in a court-baron, the defendant may wage his law; the reason is, because the matter is of small value which concerns the lord only; transacted *in pais*, [* 684] *which might be without his knowledge: But in debt on a judgment in a court-baron, the defendant cannot wage his law; for the judgment could not be but by confession or verdict, and it was in a proper court; all which the defendant cannot by his bare oath falsify; and the authorities to the contrary are not law; and so it is in debt on a judgment in a court of ancient demesne. *Br. Leyguger* 11, 34.

Lies not in debt for rent, and the reason.

In debt for rent on a lease parol, the defendant cannot wage his law; because his occupation is notorious, which is a better reason than because it savours of the reality; and so it is in account against a bailiff for the same reason, his management and transaction being notorious.

Not in debt by a gaoler for meat and drink.

In debt brought by a gaoler against his prisoner for meat and drink, the defendant cannot wage, not because the gaoler is obliged to find him victuals; that is not true, as appears by *Plowd.* 68. *a.*, but because the defendant is in

durance, and the plaintiff cannot take security from him for repayment; for a bond will be void, so that he must be content with a promise: And he did not deny the case of 9 *Co.* 87. *b.* 88. *a.*, which was debt by a labourer; it is but just that the plaintiff should prove he was retained, rather than that the defendant should be put to wage his law.

In debt on a by-law made by a company, the defendant in a case cited to be in *B. R.* about two years before, waged his law; but *Holt*, C. J. said, it was because the counsel for the plaintiff did not challenge it; for he wondered at it then; but this is not so strong as debt on a by-law by a corporation; for this obliges all strangers without notice; but the other only their own members, till notice: And the Chief Justice denied the case in *Co. Ent.* 118., and the case 2 *Ro. Ab.* 106. *pl.* 9.

Note; A bailiff may not wage his law, but a receiver may. Cro. El. 790.

WARRANTY.

[685]

Vide 2 Inst. 276. 1 Co.1. Cro. Car. 483. Cro. El. 72. Lutw. 853. Stat. 4 & 5 Ann. c. 16.

SMITH *v.* TYNDAL.

[Pasch. 4 Ann. B. R.]

IN *ejectment*, a case was made for the opinion of the Court: *Maximilian Taylor* being seised in fee made his will in the year 1674, and thereby gave several personal legacies; and, amongst others, four coats to four poor boys of the parish of *J. S.* for ever; and then he devised all his lands, tenements, and hereditaments whatsoever, and likewise all his goods, chattels, money, and personal estate, to *Margaret* his wife, and her assigns, and made her executrix, and left 1000*l.* personal estate. *Margaret* married *Archibald Tyndal*, and they two by indenture covenant to levy a fine to the use of them two for their lives, remainder to *Archibald* and his heirs with warranty, and accordingly a fine was levied.

1st, The Court held this devise to *Margaret* was a fee, because it was subject to a perpetual charge † (*a*).

† N. Only Powys and Gould went upon this reason. Holt and Powell thought that charge might be applied out of the personal estate. 2 Mod. 25.

(*a*) *Vide* 1 *Inst.* 9. *b.* 8 *Vin.* 222. *Lee* v. *Jones*, 2 *Sho.* 49. 2 *Jo.* 107.; *Baddeley* v. *Leppingwell*, 3 *Bur.* 1533.; *Frogmorten ex dem. Bramstone* v. *Holyday*, *id.* 1618.; *Goodright ex dem. Phipps* v. *Allen*, 2 *Bl.* 1041.; *Bible ex dem. Mole* v. *Thomas*, *id.* 1043.; *Doe ex dem. Palmer* v. *Richards*, 3 *T. R.*

Wood's Inst. 228. 4 & 5 Ann. c. 16. alters this point; no collateral warranty shall be a bar.

2dly, That in case it was not, yet that the heir of *Margaret* was bound by this collateral warranty.

Cestuiq; use may take advantage of a warranty annexed to the estate. 3 Rep. 62. 3 Co. 58, 59, &c. 8 Co. 54. Lutw. 853. 1 Mod. 182, 923. 2 Mod. 14.

3dly, That though a *cestuiq; use* is in the *post*, and not in the *per*, yet he may take advantage of a warranty annexed to his estate, according to *Lincoln* College's case; *ratio est*, because, by the statute of uses, the estate in law in possession is transferred to his use, and he is tenant of the legal estate, and has all advantages that the tenant had before to defend his estate; therefore he may rebut, for that is to defend; but he cannot vouch, for that is to recover in value for the loss.

Plaintiff in ejectment may make title by a collateral warranty. Vide ante, page 421.

4thly, The Court held, that the plaintiff in ejectments may make title by a collateral warranty, and give it in evidence as his title, according to 10 *Co.* 97. So if a disseisor dies after five years quiet possession, and the disseisee enter, the heir may maintain an ejectment, for the right of possession belongs to the heir, though the mere right be in the disseisee: So if a man enters by wrong and disseises another, and continues twenty years in quiet possession, yet in these cases, if a writ of right were brought, and wife joined upon the mere right, the verdict must be for the plaintiff, notwithstanding the statute of limitations in the one case† or the collateral warranty in the other.

† Qu. Or the descent cast.

[686]

Rights of entry are bound by collateral warranty. Vide Stat. 4, 5 Ann. c. 16.

5thly, That rights of entry are bound by collateral warranty as well as rights of action.

Warranty binds, not extinguishes a right.

6thly, That no warranty extinguishes a right, but only binds or bars it as long as the warranty continues in force; for if the warranty be released, the ancient right revives. *Litt.* § 708.

356.; *Goodright ex dem. Baker* v. *Southouse, id.* 272.; *Denn ex dem. Stocker*, 5 *T. R.* 13.; *Andrew* v. *Moor* v. *Miller, id.* 538.

Vide Cro. El. 694. 9 Co. 28. 1 Keb. 509.

WAIFS, ESTRAYS(*a*), &c.

HENLY *v.* WALSH.

[Mich. 4 Ann. B. R.]

Owner of a stray may seise it, tendering satisfaction. S. C. 3 D.

TRESPASS for his horse: Defendant pleaded, that, one *Pooly* was owner of the horse, and that the horse estrayed out of his possession, and came to the hands of

(*a*) In the case of an estray, proclamation must be made on *two* market days at *two* of the next market towns, shewing the marks of the cattle; and if the owner comes not within a year and a day after, and claim the cattle, they are a forfeit to the lord of the manor, *Wood's Inst.* 213.

the plaintiff, and that by command of *Pooly* demanded the horse within a year, *&c.*, and tendered amends, and that the plaintiff refusing to deliver him, he took him. To this there was a frivolous replication, and upon that a demurrer. *Et per Cur.*, 282. D. p. 2, 284. p. 2, 3. Rep. A. Q. 89. Holt 563.

1st, Without telling any marks, or making any proof of property (which may be done upon the trial) the owner may seise his horse where he finds him. *Vide Co. Ent.* 40, 170. *b. Rast.* 680. 7 *H.* 6. 2. 44 *E.* 3. 14. *Br. Estray* 1.

And, 2dly, Though the defendant does not plead directly that he tendered amends, but only that he demanded the horse *proferendo satisfaction.*; yet the Court held this a direct affirmation, like the case of *warrantizando vendidet*; where the participle affirms as directly as a verb; so *dans plagam mortalem* is well enough. *Vide* 2 *Cro.* 630. 4 *Co.*, *Long's* case.

3dly, The Court held, that though it was said he tendered amends generally, and did not express any certain sum, yet that was good in this case; and a difference was taken between this case and *that of a tender of amends for a trespass*. In that of a trespass, if the defendant pleads a tender of amends, he must shew what he tendered; for he must tender a certain sum; and the law puts this difficulty upon him, because he is the wrong-doer, and the other is confessedly a party injured: But the owner of the stray is no wrong-doer, and it is impossible he should know how long his horse had been in the lord's custody, nor how much will make a proper satisfaction (*a*).

And in pleading it, he need not shew a certain sum. Cro. El. 813.

1 Show. 161, 162.

[687]

1 Ro. 877. 2 Ro. 92. Hutt. 68.

Another exception was, that the defendant does not aver the amends tendered was refused. *Et adjournatur.* *Vide* *Cro. El.* 888, 889. 1 *Ro. Ab.* 879. 2 *Ro.* 92. 1 *Sid.* 13.

2 Vent. 109. 1 Sid. 13. Ante 623.

(*a*) But sufficient amends must be tendered, for till then the lord may lawfully detain the estray.

WEIGHTS AND MEASURES.

Vide stat. 8 Ann. c. 18. Lamb. 356. Dalt. 146, 155. Baker's Chron. 43.

DOMINUS REX *v.* FLINT.

[Mich. 10 Will. 3. B. R. 1 Ld. Raym. 442. S. C.]

THE defendant was indicted for not making his bread of lawful weight, and demurred to the indictment; and Mr. *Buxton* took exception, that it was only *debitum pondus*

In indictment for making light bread, it is not enough to shew

that it had not due weight, without shewing what is due weight, and what is wanting. S. C. Cases B. R. 242. Vide 3 Bur. 1697.

minime habens, not shewing how much *debitum pondus* was, and what was wanting; and this was agreed to be a fatal exception by *Holt*, C. J. and whereas it was said the demurrer had confessed a deficiency, the Court held the demurrer confessed nothing but what was well pleaded.

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[688]

Vide ante 579. & tit. Revocation 592.

WILLS AND TESTAMENTS.

SHIRES *v.* GLASCOCK.

[Pasch. 3 Jac. 2. C. B.]

The attestation good within the statute of frauds, if the testator might see the witnesses sign, if he pleased. S. C. Eq. Ab. 403. p. 8. Carth 81.

UPON a feigned issue, the question was, Whether the will was made according to the statute of frauds? For the testator had desired the witnesses to go into another room, seven yards distant, to attest it, in which there was a window broken, through which the testator might see them. *Et per Cur.* The statute required attesting in his presence, to prevent obtruding another will in place of the true one. It is enough if the testator might see, it is not necessary that he should actually see them signing; for at that rate if a man should but turn his back, or look off, it would vitiate the will. Here the signing was in view of the testator: he might have seen it, and that is enough. So if the testator being sick should be in bed and the curtain drawn (*a*).

(*a*) The same point was decided in *Davy and Nicholas* v. *Smith*, 3 *Salk.* 395.; and in *Casson* v. *Dale*, 1 *Bro. Ch.* 99., where the testatrix was in a carriage when the will was attested in an attorney's office, through the window of which she might see what passed there.

But if it appears that the testator could not see the witnesses attest, the will is void, though they retire for the purpose at his request, *Eccleston* v. *Petty*, al. *Speke*, *Carth.* 79. *Comb.* 156. 1 *Sho.* 89. *Holt* 222.; *Broderick* v. *Broderick*, 1 *P. Wms.* 239.; *Mackell* v. *Temple*, 2 *Sho.* 288. *Vide Longford* v. *Eyre*, 1 *Wms.* 740. If the testator, though present at the time of the attestation, is in a state of insensibility, it is insufficient, *Right* v. *Price*, *Doug.* 241.

When the attestation only expresses that the testator signed in the presence of the witnesses, not adding that they subscribed in his presence, and the witnesses are dead, it is a question for the jury whether they were present or not, *Hands* v. *James*, *Comyns* 531.; *Croft* v. *Powlett*, 2 *Str.* 1109.

WITNESSES.

S. C. 5 Mod. 15. 3 Lev. 426, 427. Skin. 578. Holt 753. Cases B. R. 72.

[Vide Title *Evidence and Proof*, p. 555.]

1. DOMINUS REX *v.* CROSBY.

[Pasch. 7 Will. 3. B. R. 1 Ld. Raym. 39. S. C.]

3 Salk. 461. 5 Mod. 74, 75.

ON a trial at bar for high treason, the prisoner, Mr. *Crosby*, took exception to *Aaron Smith*'s evidence, having stood in the pillory upon a judgment in an information against him for a libel. Mr. Solicitor and Mr. *Cowper* insisted, that the infamy flowed from the crime and not from the punishment, and that Mr. *Smith*'s crime was not infamous, nor did it deserve such punishment. *Holt*, C. J. without determining this point, held, that *Aaron Smith* was restored by the general pardon of 2 *W.* & *M.*, which operated by way of restoration, and made him a new creature. 3 *Lev.* 427. *Vide* the case of *Chester* versus *Hawkins*, that the disability flows from the infamous judgment, and not from the nature of the crime (*a*); for if a man be convict for a cheat, and adjudged to stand in the pillory, he cannot be a witness; otherwise if he be not adjudged to stand in the pillory. Also they held the infamy was by the judgment to stand in the pillory, and not from the actually standing there, and that he was disabled to be a witness, though he never stood. *Nota;* In these cases the disability is a consequence, and the pardon, which makes him *de cætero* a new creature, discharges all consequences. dependencies, &c. And therefore, in the case of the King and *Weeden Ford*, *Mich.* 12 *W.* 3. *B. R.*, the question being, Where the king could pardon the disability, and where not? *Holt*, C. J. took this difference; where the disability is only the consequence of the judgment, the king may pardon it; but where the disability is part of the judgment itself, the king's pardon will not take it away; therefore if a man be convict of perjury on the statute, the king's pardon will not restore; for it is not a consequence, but part of the judgment, *viz. quod imposterum non sit re-*

Whether the infamy arises from the crime or judgment of the pillory. Q. Vide ante 461, 514. post. pl. 3. Faresl. 101. Hob. 59. Raym. 71.

The king may pardon disability where it is only consequence of the judgment, otherwise where part of it; but in that case a statute pardon will.

(*a*) It is now settled, that it is the infamy of the crime, and not the nature or mode of the judgment, that renders a witness incompetent; *vide post. pl.* 3. 5 *Mod.* 15. 2 *Wils.* 18. *Gilb. Ev.* former editions 139. last edition 257. If one attainted of treason is pardoned, it makes him a good witness, 5 *Mod.* 16. though before the pardon he would not be so.

ceptus ut testis. Vide Co. Ent. 368. But a pardon by act of parliament will restore him in that case. *Quod nota.*
[690] *Quære* of a perjury at common law; and if the law be the same; for there the disability is only a consequence, and not part of the judgment; otherwise if a jury be convict in attaint. *Rast.* 86. *a.*

2. PITMAN *v.* MADDOX.

[Hill. 11 Will. 3. *Coram Holt,* C. J. *At* nisi prius *in* Middlesex. 1 Ld. Raym. 732. S. C.]

Shop-book allowed as evidence on proof of the servant's hand, who made the entries, he being dead. Vide ante 281, 285, 555, & Faresl. 9 6 Mod. 149. 1 Vent. 151. 6 Mod. 248. 1 Salk. 285, 286, 287. Faresl. 129. S. C. Holt 298. Vide Bull. N. P. 283.

INDEBITATUS assumpsit on a tailor's bill; at the trial, *coram & per Holt,* C. J. a shop-book was allowed for evidence, it being proved that the servant that writ the book was dead, and this was his hand, and he accustomed to make the entries; and no proof was required of the delivery of the goods; and the Chief Justice said, it was as good evidence as the proof of a witness's hand to an obligation; and he held, that though the statute 7 *Jac.* 1. *c.* 12. says, A shop-book shall not be evidence after the year, *&c.*; that it is not of itself evidence within the year.

3. DOMINUS REX *v.* FORD.

[Mich. 12 Will. 3. B. R.]

Prisoner having escaped may be a witness to prove the escape voluntary, upon traverse of an inquisition for the office against the gaoler. Post pl. 5.

Vide 4 Bur. 2251.

UPON a special commission issued out of Chancery, an inquisition was taken, which found, that *Weedon Ford* had committed five voluntary escapes. *Ford* traversed, and upon the trial, one who was suffered to escape, but was returned again, was produced to be a witness: And it was objected, that this was to save his own bond which he had given to be a true prisoner, and would entitle him to an action of false imprisonment against the marshal, and compared it to the case of an usurious bond. *Sed per Cur.* The bond given by the prisoner is a collateral matter to the escape; and the consequence of his evidence as to that bond is not material to disable his being a witness; and it is not like the case of usury; for that renders the bond void; and this is a matter privately transacted between the party and the officer, of which there can be no other evidence.

2dly, That this witness was convict of barretry, and the record produced; but the judgment was, to be fined 500 marks, and not to stand in the pillory. On the other side

it was argued, that a bare conviction of perjury would take away one's evidence, because it is an infamous crime; but not so of barretry, which was not of an infamous nature, without an infamous punishment, as the pillory. *Curia contra.* He is disabled by the conviction, for it is not the nature of the punishment, but the nature of the crime and conviction, that creates the infamy.

The nature of the crime and conviction, not of the punishment, makes the infamy. Vide ante pl. 1. 2 Wilson 18.

[691]

Then it was insisted, that he was pardoned by the late general pardon. *Et per Holt*, C. J. If one be convict of perjury upon the statute (*a*), he cannot be restored to his credit by the king's pardon; for, by the statute, it is part of the judgment that he be infamous and lose the credit of testimony; but he may by a statute-pardon. But in other cases, where the infamy is only the consequence of the judgment, the king's pardon may restore the party to his testimony. Held upon a trial at bar.

Perjury. Vide ante 513, 514, 689. 6 Mod. 168. 1 Hawk. P. C. cap. 69.

(*a*) Otherwise where convict on an indictment *at common law*, 3 *Salk.* 155.

4. ANONYMOUS.

[Pasch. 13 Will. 3. B. R.]

IF a witness going to sea be by rule of Court examined upon interrogatories before a judge, and the trial come on before he is gone, his deposition shall not be read, but he must appear; for the rule was made on supposal of his absence.

Vide ante 555, &c. ib.

Deposition of a witness examined before a judge because going beyond sea, cannot be read if he be in England. Bull. N. P. 239.

5. *Inter* OXENDEN BAR. *and* PENERICE.

[In Canc.]

A QUESTION was in Chancery, Whether a legatee could be a witness against a will? *Et per Cur.* upon debate, The reason why a legatee is not a witness for the will, is because he is presumed to be partial in swearing for his own interest: But the legatee, when he swears against the will, swears against his interest, and so is the strongest witness.

Legatee may be a witness against a will. Vide pl. 3.

Vide ante 548, 661.

WORDS IN GENERAL.

1. SMITH v. WOOD.

[Mich. 5 W. & M. B. R.]

To call H. whoremaster, is suable in the Spiritual Court. Vide 3 Lev. 17, 18, 119, 137. 2 Lev. 63. 3 Keb. 58. 1 Lev. 116. 1 Sid. 433. 1 Jo. 44. 3 Lev. 350. S. C. Comb. 226 Skin. 390. So of wittal. 2 Lev. 66. 1 Mod. 23.

LIBEL in the Spiritual Court for these words, *You are a rogue, rascal, whoremaster, and son of a perjured affidavit-bitch.* *Selby* moved for a prohibition; and all the words being waived but the word *whoremaster*, he urged, that it was only a word of heat, and that words of passion were not defamatory, being regarded by the hearers no more than the words of one *non compos*, or mad; *ira furor brevis est.*

Holt, C. J. To say *whoremaster* of a man is the same with *whore* of a woman, which is an ecclesiastical slander. *Et per Selby*, The reputation of a man is not so nice; but the Court would not distinguish them, and therefore denied the prohibition. *Holt*, C. J. said, To call a man cuckold was not an ecclesiastical slander, but *wittal* was; for it imports his knowledge and consent to his wife's adultery. *Vide* 1 *Sid.* 248. *Cro. Car.* 339.

Impudent brazen-faced Belzebub, not suable. Comb. 26, 28, 29.

Impudent brazen-faced Belzebub are not suable in the Spiritual Court, for they import passion, but no crime nor discredit any more than *Devil*, or *Prince of Darkness.*

2. COXETER v. PARSONS.

[Hill. 10 Will. 3. B. R. 1 Ld. Raym. 423. S. C.]

Suit lies not in the Spiritual Court for words, charging an offence not punishable there. Vide Faresl. 31. S. C. Cases B. R. 231. 2 Lev. 41. Godb. 447. 2 Rol. 295.

DOCTOR *Parsons* libelled against *Coxeter* in the Spiritual Court, for saying of him, *he had no sense, was a dunce, and a blockhead; and he wondered the bishop would lay his hands upon such a fellow, and that he deserved to have his gown pulled over his ears:* And a prohibition was granted; for a parson is not punishable in the Spiritual Court for being a knave or a blockhead, more than another man; and whereas it was urged, that a parson might be deprived for want of learning; the Chief Justice said, If that be the case he must bring his action at law; for that was a temporal damage. And a prohibition was granted.

3. ACEBERY *v.* BARTON.

[Pasch. 4 Ann. B. R.]

A WOMAN libelled in the Ecclesiastical Court against another for these words, *you are a brandy-nosed whore, you stink of brandy:* Mr. *Earle* moved for a prohibition, insisting, they rather charged intemperance than incontinence. *Vide* 2 *Rol. Ab.* 296. *placito* 15. 1 *Jo.* 44. 1 *Cro.* 110. 2 *Keb.* 334, 577, 581. 1 *Sid.* 433. 1 *Mod.* 23. 3 *Lev.* 119. *But the Court denied a prohibition.*

Words of incontinence.

Comyns, Prohibition G. 14.

WORDS ACTIONABLE OR NOT ACTIONABLE.

1. TASSAN *v.* ROGERS.

[Mich. 1 W. & M. B. R.]

CASE for words of a butcher, on a *colloquium* of the cow and the flesh, that the *cow died with calving, per quod* he lost such and such customers. Verdict and judgment *pro quer.* in the *Marshalsea;* but on a writ of error it was reversed here; for the words are not actionable; and the special damage does not help it; for it is not said he could not sell the rest of his cow, but that he lost customers.

Words of a butcher, that the cow died a calving, per quod he lost his customers, not actionable. Comb. 161.

2. BYRON *v.* ELMES.

[Mich. 8 Will. 3. B. R.]

IN case for words, the plaintiff declared, that she being a young woman, the defendant, to hinder her marriage, said, *what did you go to* London *for, but to drop your slink? She went to* London *last winter to lie in, and to my knowledge several people have lain with her.* And they were held not actionable; for it is not having a bastard, but the fornication is the crime here, and that being punishable in the Spiritual Court, is not punishable here without a temporal loss. Having a bastard was never actionable be-

Charge of fornication not actionable without special damage. S. C. Comb. 391. Cases B.R. 106. 1 Rol. 34, 36. 1 Sid. 396.

[694]

fore the statute; nor is it since, unless the parties come within the penalty of the statute, which is only when the parish is chargeable.

3. ANONYMOUS.

[Mich. 8 Will. 3. B. R.]

She had a bastard, not actionable, because it does not appear that was chargeable to the parish. 1 Vent. 4. Comb. 137. S. C. 292. 1 Sid. 396. 2 Sid. 7, 21. 1 Rol. Abr. 34, 37, 38. Palmer 298.

CASE for these words, *she had a bastard child*, and verdict for the plaintiff; and the Court thought them not actionable, according to *Salter* and *Brown's* Cases. *Cit.* . and denied *Anne Davies's* Case, 4 *Co.* 16. *b.* for she is not punishable at common law in the king's temporal courts for having a bastard; nor is she punishable by 18 *Eliz.* unless her bastard be likely to become chargeable to the parish; the statute only extends to such bastards. In other cases she is only punishable in the Spiritual Court for whoring, and may sue there, but cannot sue here too; for the party would be doubly punished by that means. *Sed adjournatur.*

S. C. 5 Mod. 398.

4. SAVAGE v. ROBERY.

[Pasch. 10 Will. 3. B. R.]

Cheat, spoke of a trader, not actionable without laying a colloquium of his trade. 1 Lev. 280. Comber. 292. 3 Keb. 34. 3 Lev. 5, 62. Still. 420. 3 Mod. 112. Comyns, Action for Defamation, G. 3.

THE plaintiff declared, that he was a trader, and the defendant said of him, *you are a cheat, and have been a cheat for divers years.* Upon the first motion, which was *Mich.* 9 *Will.* 3. *B. R. Holt*, C. J. held, the words must be understood of his way of living, and that it needed no *colloquium.* But *Pasch.* 10 *W.* 3. *B. R.* *Mutata opinione*, judgment was arrested (*a*). *Vide* 1 *Vent.* 117, 263. 2 *Saund.* 307. *Jones* 156. *Raym.* 62, 169.

(*a*) *R. ac. Str.* 696. *Vide Str.* 797, 1169.

5. HOW v. PRINN.

[Mich. 1 Ann. B. R. 2 Ld. Raym. 812. S. C.]

Do not vote for him, for he is a Jacobite, and for bringing in the Prince of Wales and Popery, to destroy our nation, spoken of a justice of peace

THE plaintiff declared, that being a justice of peace and deputy-lieutenant, and having served as knight of the shire for the county of *Gloucester*, and intending to stand candidate again to be knight of the shire for the said county, defendant in discourse with *J. S.* speaking of the plaintiff and his standing candidate, said, *Do not vote for him, for he is a* Jacobite, *and for bringing in the Prince*

of Wales *and Popery, to destroy our nation.* Verdict for the plaintiff, and entire damages. and deputy lieutenant; held actionable.

In arrest of judgment it was objected, 2 Mod. 26.

1st, That it was incertain where the Prince of *Wales* should be brought in. 3 Lev. 30. S. C. 2 Lutw. 1293. N. L. 410. Far.

*2dly, That there was no such person, and the Court could take no notice of him. 107. Holt 652. Faresl. 107. S.C. Lutw. 1294.

3dly, He might mean it legally by act of parliament. [* 695]

4thly, he is not charged with any act.

5thly, The offices recited were not offices of profit. *Sed per Cur.*:

1st, The words being spoken with respect to an *Englishman*, therefore the *bringing in* must be supposed to be into *England;* the rather, because it is said to be, to destroy our nation; and the defendant could not have been found guilty, if he had appeared upon trial to be a *Dutchman*, as in *Cromwell's* case, *Thou art a murderer;* upon evidence, it appeared to be spoke in the sense, *a murderer of horses;* and the defendant was acquitted.

2dly, We will take notice of the Prince of *Wales*, not as really such, but pretendedly such, being mentioned in acts of parliament; and one may gain a name by reputation, as a bastard does that of his reputed father.

3dly, We cannot suppose he can mean to do this fairly; but if he does, it is scandal; for the king and government being protestant, it is good reason for them to displace him, as not fit to be trusted.

4thly, As to his not being charged with any act, inclination and principles are sufficient without an act. 3 *Lev.* 90. 1 *Brownlow* 5. *March* 4. 1 *Ro.* 86. *Ellis's* case, and so was Sir *Tho. Clargis's* case.

5thly, In offices of profit, words that impute either defect of understanding, of ability, or integrity, are actionable; but in those of credit, words that impute want only of ability, are not actionable, as of a justice of the peace: *He a justice of peace! He is an ass, and a beetle-headed justice: Ratio est,* because a man cannot help his want of ability, as he may his want of honesty; otherwise where words impute dishonesty or corruption; as in this case, where the office is an office of credit, and the party charged with inclinations and principles which shew him unfit, and that he ought to be removed, which is a disgrace (*a*).

In offices of profit, words imputing want of ability are actionable; otherwise in offices of honour. Vide post. 698. Cro. Car. 223.

Vide 1 Str. 617. 2 Ld. Raym. 1396. 3 Wils. 177.

(*a*) Judgment for the plaintiff affirmed in the House of Lords, 7 *Mod.* 113. 1 *Bro. P. C.* 97.

S. C. 6 Mod. 23. Holt 654.

6. BAKER v. PIERCE.

[Mich. 2 Ann. B. R. 2 Ld. Raym. 959. S. C.]

You stole my boxwood, and I will prove it, actionable. Vide prox. page 68. 6 Mod. 104. 1 Jon. 11, 68, 195, &c. Poph. 211. 1 Mod. 22. 1 Lev. 280. Cro. Jac. 39, 2, 43, 8, 312, 13, 231, 11, 442, 16. 2 Keb. 181. 1 Lev. 205. 1 Sid. 324. 3 Lev. 166. Hob. 305. All. 11. con. Cro. Jac. 430.

YOU *stole my boxwood, and I will prove it*, were held actionable, for they tend to disgrace the plaintiff with an imputation of felony, and may be so understood. These sort of actions stand upon their own bottom, and are under no set rule, but ought to be encouraged to prevent breaking the peace. *Thou* art a thief, and hast stolen my wood*, are actionable, there is no difference between *and* and *for*. To say *a man has the pox*, is not actionable; but to say farther, *and got it of a yellow-haired wench* in *Moorfields*, are actionable; not that the intendment is necessary that he meant the *French-pox*, but the sense leaned that way.

[*696]

7. GRAVES v. BLANCHET.

[Pasch. 3 Ann. B. R.]

See 4 Co. 17, &c. Mod. Cas. 148. S. C. 1 Vent. 4. 1 Sid. 396. Hob. 256. 1 Cro. 436. Andrews 376.

ACTION for these words, *She is a whore, and had a bastard by her father's apprentice*; judgment was arrested. The Court said they could not overthrow so many authorities. The reason of the law is, that fornication is a spiritual offence; and no action lay at common law for what the common law took no notice of, without special damage.

8. WALMSLEY v. RUSSEL.

[Trin. 3 Ann. B. R.]

There goes your rare chancellor to suborn witnesses to swear against the parson, not actionable. Vide 3 Lev. 166. 1 Co. 55, 16. S. C. 6 Mod. 200.

IN *case for words*, the plaintiff in his declaration shewed, that he was chancellor to the bishop, and stood for parliament-man, and the defendant to defame him said, *There goes your rare chancellor to suborn witnesses to swear against the parson*. *Powys* and *Gould*, Justices, held them actionable, because they touched him in his office, and suborning is to be taken in *malem partem;* and the words were the falser if there was no perjury or swearing. *Vide* 3 *Cro.* 93. 1 *Lev.* 118, 180. 1 *Cro.* 14, 15, 190. *Hard.* 103, 501. *Mo.* 243. 1 *Vent.* 20. 1 *Ro.* 79. *Holt* C. J. and *Powell*, J. *contra*, To say, a man is forsworn is not actionable; *a fortiori*, to say one suborned another to forswear: *Suborning* is not a crime of itself, but as it relates to perjury, and there cannot be a subornation of perjury or swearing, but where there is perjury and swearing. Here

Vide 1 Rol. 51.

is nothing said that relates to his office, or touches it; *there goes your rare chancellor*, is only a description of the person.

9. TURNER *v.* OGDEN.

S. C. 6 Mod. 104. Holt 40.

[Hill. 3 Ann. B. R.]

THOU art one of those that stole my Lord Shaftesbury's *deer;* held not actionable; for though imprisonment be the punishment in those cases, yet *per Holt*, C. J. It is not a scandalous punishment. A man may be fined and imprisoned in trespass; for there must not only be imprisonment, but an infamous punishment; it is true, calling *Papist* has been held actionable, but that was only in respect of the times.

Words subjecting H. to punishment may not be actionable, unless scandalous. See 6 Mod. 23, and ante 695. 1 Jon. 196. 2 Vent. 265. 1 Roll. Abr. 60. Yelv. 64. 2 Sho. 32. Cro. Eliz. 297.

10. SPEED *v.* PERRY.

[697]

[Trin. 4 Ann. B. R. 2 Ld. Raym. 1185. S. C.]

CASE for these words, *You are a rascal, and a villain, you have forgot since you lived in the* Black-bull *yard; there you could procure broad money for gold, and clip it when you had so done, and then the shears could go.* Serjeant *Darnell* moved in arrest of judgment, because the words imputed no act, but a power only. *Sed per Cur.* Where the matter imputed is confined to a particular place, *as you could in such a place*, they must be understood to imply an act; for a power is the same in all places. And *Powell* cited the case of *Horne* and *Powell*, *Trin.* 12 *Will.* 3. *C. B. You may well spend money at law, for you can coin money out of halfpence and farthings*, which was held to import an act done, because by a bare power he could never be able to spend money at law; and the Court denied. 1 *Ro.* 72. *placito* 9. (*a*)

In Black-bull yard you could procure broad money for gold, and clip it; held to import an act, and actionable.

(*a*) *Vide Peake* v. *Oldham*, *Cowp.* 275.

WORDS INDICTABLE AND NOT INDICTABLE.

1. DOMINA REGINA *v.* LANGLEY.

[Hill. 2 Ann. B. R. 2 Ld. Raym. 1029. S. C.]

Words of slander spoken of a mayor, not indictable; otherwise if written. Comb. 46, 65. S. C. 6 Mod. 124. 5 Salk. 190. Holt 654. Vide Str. 420.

INDICTMENT for saying to the mayor of *Salisbury*, *You, Mr. Mayor, I care not a fart for you;* and at another day, *You are a rogue and a rascal.* On demurrer, Mr. *Ward* argued, they were not spoken while he was in the execution of his office, and that this is no offence indictable. *Vide* 1 *Ro. Rep.* 79. 11 *Co.* 95. 3 *Cro.* 78, 689. *Mo.* 247. 1 *Vent.* 16. *Vide cont.* 1 *Cro.* 503, 504. 2 *Bulst.* 139, 140. 3 *Mod.* 139. *Holt*, C. J. These words are not indictable, for the mayor was not in execution of his office nor a patent officer. It might be more doubtful if the words were of a patent officer; for then it is an aspersion to the queen and government that employs him. Here it does not appear the mayor was a justice of peace; at least not by commission from the king; yet if these words had been written, an indictment would have lain. *Vide* 1 *Sid.* 270. 1 *Lev.* 139. *Et per totam Curiam*, Words that directly tend to the breach of the peace, as if one man challenge another, are indictable; and the commission of *oyer* and *terminer de propalationibus verborum*, is to be construed of words against the government, or *scandalum magnatum*, &c. But for these *petit offences*, which are *contra bonos mores*, the law has another provision, by requiring surety for the peace and good behaviour; in default whereof the magistrate may commit him, when spoken out of court; and when in court, then the magistrate may proceed summarily against him, and fine him for the contempt (*a*). Quashed.

[698]

Clause de verborum propalationibus in the commission of oyer and terminer, what it refers to.

(*a*) Or commit him, 7 *Mod.* 29. 3 *Salk.* 198. *Wood's Inst.* 447, 486. 11 *Co.* 43.

2. DOMINA REGINA *v.* WRIGHTSON.

Vide Cro. Car. 223.

[Pasch. 7 Ann. B. R.]

Words of a justice of peace: He is a fool, an ass, and a coxcomb, and knows no

INDICTMENT for saying of Sir *Rowland Gwyn*, who was a justice of peace, in discourse concerning a warrant made by him, Sir *Rowland Gwyn is a fool, an ass, and a coxcomb, for making such a warrant, and he knows*

no more than a slickhill, held naught on demurrer. The Court held, that here was a breach of good manners, and he might be bound to the good behaviour; but here was no indictable offence. The counsel urged, that though words spoken of a magistrate in the execution of his office, might be indictable as a matter that disturbs the public peace; yet not when it refers to some particular act. *Vide* 2 *Keb.* 494. *Hutt.* 131. 1 *Cro.* 362. 3 *Mod.* 139. 1 *Vent.* 169. And *Domina Regina* versus *Solcy*, *Mich.* 4 *Ann. B. R.* who was indicted for these words, *He is not fit to be a justice; for if a man is before him, he will give it right or wrong where his affection is;* and ruled the indictment lay not. *Et per Holt*, C. J. To say, *a justice is a fool*, or *an ass*, or *a coxcomb*, or *a blockhead*, or *a bufflehead*, is not indictable; *quod fuit concess. per Powell. Vide* 2 *Ro. Rep.* 78. 4 *Inst.* 181.

more than a slickhill, not indictable, but cause to bind to the good behaviour. Cro. Jac. 56, 1, 58, 4, 240, 6, 484, 3, 557, 3. S. C. Rep. A. Q. 166. Holt 354. Ante 695.

Vide Str. 420, 1158.

WRIT.

[699]

Vide ante Mandamus, Replevin, Retorns. Hob. 83.

1. TOUCHIN'S *CASE*.

S. C. 1 Salk. 48, 49. 6 Mod. 164. & 276 to 287.

[Mich. 12 Will. 3. B. R. Vide *title* Amendment.]

State Trials 659 to 706.

IN all continued writs the *alias* must be tested the day the former was returnable. *Vide ante* 554.

2. DOMINUS REX *v.* THE MAYOR OF HERTFORD.

[Mich. 11 Will. 3. B. R.]

INFORMATION in nature of a *quo warranto;* a *venire* issued returnable in *Easter-term*, and a *distringas* in *Trinity*, and an *alias distringas* fifteen days from the *teste* the same *Trinity term:* It was objected, that this was irregular, for that all process on the crown side is returnable *de termino in terminum*, and not in fifteen days, and the precedents are so: It was answered, that process of outlawry was the only process returnable *de termino in terminum. Vide* 2 *Inst.* 550. 1 *Inst.* 134. 9 *Co.* 119. *b.* [*Note;* These authorities are general, and make no distinction.] *Holt*, C. J. said, There was no question but the process

Process out of the Crown-office may be returnable in fifteen days, except of outlawry, which must be *de termino in terminum.*

Quoad the process, vide 2 H. P. C. 284, fol. edition.

might be sued out returnable in fifteen days; and Sir *Samuel Astry* reported the practice according to this diversity.

S. C. Ante 431, 432.

3. DOMINUS REX *v.* THE MAYOR, *&c.* OF ABINGDON.

[Pasch. 12 Will. 3. B. R. 1 Ld. Raym. 559. S. C.]

Writ of mandamus ought to be directed to the persons who are to do the act. Vide post. pl. 6. Mod. Cases 133.

Vide Str. 55, 640. Comyns, Mandamus, C. 1.

[700]

A *MANDAMUS* was directed *Jacobo Courtten majori, ballivis, & omnibus principalibus burgensibus burgi de Abingdon*, who by the constitution were to chuse the mayor out of such persons as should be proposed by the commonalty, commanding them to chuse accordingly. It was objected to the writ, that it was misdirected; for that this was but a part of the corporation, *viz.* chief burgesses; whereas the name of the corporation was, mayor, bailiffs, and burgesses; and it was urged that persons constituting a corporation could be considered but in one of these two capacities, *viz.* their corporate or their natural; and that the writ must be directed to them, either by their names, or as a corporation; and they cited *Holt*'s case, 2 *Jones* 52. in point. *Holt*, C. J. said, That case was not law; that Serjeant *Pemberton*, Sir *William Jones*, and all the learned part of the bar, wondered at the resolution: And though it should be true, that a mandatory writ might be directed to the whole corporation, yet it could not be necessary it should be directed to more than those, or that part of the corporation that was concerned in the execution of the thing required; for it is not in the power of others to put the command of the writ in execution: And the writ was held good.

S. C. Faresl. 29. Holt 761. 3 D. 121. p. 6. Ante 273.

4. SHIRLEY *v.* WRIGHT.

[Trin. 1 Ann. B. R. 2 Ld. Raym. 775. S. C.]

Writ of execution returnable two terms from the teste, is well; mesne process, void.

IN *debt* for an escape of one taken upon *ca. sa.* which appeared to be returnable the term next but one after the *teste*, so that a term intervened. After a verdict for the plaintiff, it was moved in arrest of judgment, that the writ was merely void, and consequently there could be no escape, and the sheriff did well to let him go; and 3 *Cro.* 468. was cited as a case in point. On the other side, to shew that a writ may be faulty, and yet not void, were cited *Poph.* 271. *Dy.* 67, 175. 21 *H.* 7. 16. *Sty.* 339. 1 *Ro.* 242. 3 *Cro.* 188. *Mo.* 274. 1 *Cro.* 271. 2 *Bulst.* 256. 2 *Ro. Rep.* 432. *Per Holt*, C. J. Escape lies against the sheriff; and there is a difference between a *capias* in mesne

process, and a *capias* in execution: In mesne process, if a term be omitted the writ is void in all actions personal (*a*), and the sheriff shall not be charged; for the cause is discontinued and out of court by the intermission; and by not having a day in court by the return of the writ as he ought, the party may be at great prejudice by reason of the imprisonment in the mean time.

But in executions, a *ca. sa.* omitting a term, is not void; for the party is not to have a day in court; his cause is at an end, and he must be in prison, whether the writ be returned, or not; nor is it necessary it should be returned. *Per Curiam.* The plaintiff had judgment, *nisi, &c.*

1 Lev. 254. 1 Saund. 161, 162. 2 Lev. 109. Writ bearing teste out of term is void, but the sheriff is justifiable.

And in the same case, *Holt*, C. J. said, If a writ of execution bear *teste* out of term, the sheriff is justifiable, and yet shall not be liable to an action of escape, for it is a void writ.

(*a*) *R. ac. Parsons* v. *Lloyd,* 2 *Bl. Rep.* 846. 3 *Wils.* 341.

5. HELLIOT *v.* SELBY. [701]

[Trin. 2 Ann. B. R. 2 Ld. Raym. 902. S. C.]

Defendant cannot take advantage of an ill original by the recital, but upon oyer or certiorari. Vide ante 497, 658. 6 Mod. 28. S. C. 3 Salk. 355.

IN *replevin* the declaration was, that the defendants *summoniti fuerunt ad respondend. de placito captionis & injustæ detentionis averriarum ipsius, &c.* The defendant avowed, and the plaintiff pleaded in bar, and the defendant made a naughty rejoinder, upon which it was demurred. And now *Weld* took exception to the original, that it was nonsense, and that there was no such a word as *averriarum*. *Holt*, C. J. If the original had been *averiarum*, it had been naught; but this is only a recital of an original, and the Court will not judge upon a recital; but the way to take advantage is, to crave *oyer*; for this recital is only a short intimation to the Court of what the kind of the plea is. *Powell*, J. A replevin may be by plaint in the county, as well as by original here, because it is *summonitus*. And if this case had been here by error out of the Common Pleas, in which case the plaintiff could not have taken advantage of this fault by (*a*) *oyer*, then he must have alleged diminution and prayed a *certiorari*; and if the original returned had been so, the Court would have reversed the judgment.

Vide H. Bl. 250. Str. 225.

(*a*) Query if it should not be "without *oyer*?"

6. DOMINA REGINA *v.* THE MAYOR, *&c.* OF HEREFORD.

[Trin. 4 Ann. B. R.]

Writ of mandamus ought to be directed to the persons who are to do the act. Vide, ante 431, 479, & 699. pl. 3. Mod. Cases 133, 309. S. C. 6 Mod. 309. Rep. A. Q. 188. Vide Str. 65.

A *MANDAMUS* to admit one to the office of town-clerk was directed to the mayor and aldermen of *Hereford;* and Mr. *Eyres* urged the writ ought to be directed to the body politic, in whom the inheritance of the franchise was, by the name of incorporation, and that was, mayor, alderman, and citizens; and indeed the writ was returned by the mayor, aldermen, and citizens in this case, and cited 3 *Bulst.* 190. *Holt*, C. J. denied that case, and said, it is enough to direct the writ to those that are to execute the writ, or do the thing required: Then it appeared the mayor only was to admit; whereas the writ was directed to the mayor and aldermen; and *Holt*, C. J. thought the word aldermen was surplusage, and the writ well enough; *Powell*, J. *contra.* Writs ought to be directed to those, and to those only that are to obey the writ: How will people know who are to obey the writ, if the direction is insignificant or immaterial? If a writ be directed to the coroner and sheriff, where it ought to be to one only, it is naught: *Powys* and *Gould*, Justices, agreed, and the writ was quashed.

[702]

7. ANONYMOUS.

[Trin. 13 Ann. In Canc.]

Ne exeat regnum to stay H.'s going to Scotland since the Union. Of ne exeat regnum, see 2 Inst. 54. 4 Mod. 179. 3 Mod. 127, 169. 2 Show. 227, &c. 1 Chan Cas. 115, 116. 2 Chan. Cas. 245. Of homine replegiando's & withernams, vide tit. Replevin. Vide ante 681. Faresl. 9.

A *NE exeat regnum* was granted to stay the defendant from going to *Scotland;* for though that is not out of the kingdom, yet it is out of the reach of the process of this Court, and within the same mischief (*a*).

Note; A writ of covenant is not amendable either by common law or by the statute. 1 *Salk.* 53.

(*a*) The condition of the recognizance shall be, that he does not go out of the realm or to *Scotland,* 1 *P. Wms.* 263. *S. C.* Mr. *Cox* has added a note to that report, by the name of *Done's* case, of which the following is a copy:—" With respect to this writ, it has been determined, 1st, That it cannot be granted except on bill filed, *ex parte Brunker,* 3 *Atk.* 312. 2dly, That it shall not issue on a mere legal demand for which the defendant might have been holden to bail, *ex parte Brunker, ubi supra; Anon.* 2 *Atk.* 210. *Pearne* v. *Lisle, Ambler* 76.; *Atkinson* v. *Leonard,* 3 *Bro. Ch.* 218.; but from

the last-mentioned case it seems that it shall issue where the courts of law and equity have concurrent jurisdiction. It may also issue at the instance of a wife who is suing for alimony in the Spiritual Court, because that Court cannot hold to bail, Sir *J. Smithson's* case, 2 *Vent.* 345.; *Read* v. *Read,* 1 *Chan. Ca.* 115.; *Anon.* 2 *Atk.* 210.; *Pearne* v. *Lisle, ubi supra.* 3dly, The demand must be certain in its nature, *Anon.* 1 *Atk.* 621.; *Anon.* 1 *Bro. Ch.* 376. 4thly, That in general the application must be supported by an affidavit swearing positively to the debt, *Rice* v. *Gualtier,* 3 *Atk.* 501.; *Anon.* 2 *Vez.* 489.; but on a bill for an account, it is sufficient for the plaintiff to swear to the balance as to his belief, *Rice* v. *Gualtier, ubi supra.* Where the demand is against an administrator, *&c.*, the plaintiff should also swear to his belief of assets come to the defendant's hands, *Anon.* v. *Vez.* 489. 5thly, This writ may issue against a feme covert executrix, whose husband is out of the jurisdiction, *Jerningham* v. *Glass,* 2 *Atk.* 409, and *Ambler* 62. *S. C.*; and *Moor* v. *Melish,* therein cited. 6thly, But as the real object of the writ, when applied to private concerns, is to compel the defendant to abide the event of the suit, the Court always inclines to discharge the writ upon such security being given, *Baker* v. *Dumaresque,* 2 *Atk.* 66.; *Jerningham* v. *Glass, ubi sup.*; *Robertson* v. *Wilkie, Amb.* 177.; *Atkinson* v. *Leonard, ubi supra.* Whether the writ shall issue against a foreigner or person usually resident out of the jurisdiction, in respect of a demand which originated abroad, and is there suable, *vide Pearne* v. *Lisle, Robertson* v. *Wilkie,* and *Atkinson* v. *Leonard, ubi supra.*

PLEADINGS TO THE CASES.

Pleas before our Lord the King at Westminster, *of the Term of* Easter *in the Seventh Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll.* 242.

SIR JOHN DALSTON *against* JANSON.

[3 Ld. Raym. Entries, 115. S. C.]

Salk. 10. 5 Mod. 90. Comb. 333. 3 Salk. 204. Cases B. R. 73. Holt 7. S. C.

A count on the custom of the realm against a common carrier.

London, to wit. "BE it remembered, That heretofore, to wit, "in *Hilary* term last past, before the lord the "king, at *Westminster*, came Sir *John Dalston*, knight and "baronet, by *John Pratt* his attorney, and brought into "the court of our said lord the king, then there, his cer-"tain bill against *Joshua Janson*, a common carrier, in "the custody of the marshal, *&c.*, of a plea of trespass "upon the case, and there are pledges of prosecuting, to "wit, *John Roe* and *Richard Doe*, which said bill follow-"eth in these words, to wit, *London*, to wit, Sir *John Dal-*"*ston*, knight and baronet, complains of *Joshua Janson*, "a common carrier, in the custody of the marshal of "the Marshalsea of our lord the king, before the king "himself being, for that, to wit, That whereas the said "*Joshua*, on the 16th day of *March*, in the year of our "Lord one thousand six hundred and ninety-three, and "long before, and ever since, has been and still is a "common carrier of goods and chattels, and for his pro-"fit used to bear and carry the goods and chattels of all "persons whatsoever requiring such carriage, from *Wake-*"*field* in the county of *York* to *London*, and from *London* "aforesaid to *Wakefield* aforesaid, throughout all the said "time for the reward to be had for the same. And "whereas by the law and custom of this realm of *Eng-*"*land*, every common carrier of goods and chattels, who "receives goods and chattels so to be carried, is obliged "to preserve and carry the same without any diminution "or loss, so that by the default of such common carrier "or his servant, no damage may any ways happen there-"unto. And whereas the said Sir *John*, on the said six-"teenth day of *March* in the year of our Lord one thou-"sand six hundred and ninety-three abovesaid, at *London* "aforesaid, to wit, in the parish of Saint *Mary le Bow* in

"the ward of *Cheap*, was possessed of the following goods "and chattels, to wit, of one deal box, and one hundred "pieces of golden coin called guineas, of lawful *English* [704] "money, as of his proper goods and chattels: And the "said Sir *John* being so possessed on the said sixteenth "day of *March* one thousand six hundred and ninety-three "aforesaid, at *London* aforesaid, to wit, in the parish and "ward aforesaid, delivered the said box with the said one "hundred pieces of golden coin being in the same, to the "said *Joshua*, to carry the same safely and securely for "hire from *London* aforesaid to *Wakefield* aforesaid, in the "county of *York* aforesaid, and there deliver the same to "the aforesaid Sir *John*: And the aforesaid *Joshua* then "and there received and had the said box, and the said "one hundred pieces of gold in the same being, to carry "and deliver in manner aforesaid: Nevertheless the said "*Joshua* hath not at any time hitherto delivered the said "box with the said one hundred pieces of gold in the same "being, to the said Sir *John*, but the said box, and the said "one hundred pieces of gold coin in the same being, after-"wards, to wit, on the seventeenth day of *March* in the "year of our Lord one thousand six hundred ninety and "three aforesaid, at *London* aforesaid, in the parish and "ward aforesaid, for want of the safe keeping thereof by "the said *Joshua*, were destroyed and lost.

Trover laid in the same held not joinable. 2 Wilson 319 contra.

"And whereas also, on the said sixteenth day of *March* "in the year of our Lord one thousand six hundred ninety "and three abovesaid, at *London* aforesaid, to wit, in the "parish and ward aforesaid, the said Sir *John* was possess-"ed of the other goods following, to wit, of one deal box "and one hundred pieces of golden coin called guineas, "of lawful *English* money, as of his proper goods and chat-"tels, and being so possessed, the said Sir *John* afterwards, "to wit, the same sixteenth day of *March*, in the year of "our Lord one thousand six hundred ninety and three "aforesaid, at *London* aforesaid, in the parish and ward "aforesaid, casually lost those goods and chattels out of "his hands and possession, which said goods and chattels "afterwards, to wit, the same sixteenth day of *March*, in "the year of our Lord one thousand six hundred ninety "and three abovesaid, at *London* aforesaid, in the parish "and ward aforesaid, by finding came to the hands and "possession of the said *Joshua*: Yet the said *Joshua*, know-"ing the goods and chattels last before-mentioned to be "the proper goods and chattels of the said Sir *John*, and "to him the said Sir *John* of right to belong and apper-"tain, yet fraudulently contriving and intending craftily "and subtilly to deceive and defraud the said Sir *John*, "hath not yet delivered the goods and chattels last before-

"mentioned to the said Sir *John*, although often request-"ed, *&c.*, but afterwards, to wit, the seventeenth day of "*March*, in the year of our Lord one thousand six hun-"dred ninety and three aforesaid, at *London* aforesaid, in "the parish and ward aforesaid, converted and disposed "of the goods and chattels last mentioned to the proper "use and advantage of him the said *Joshua*, to the dam-
[705] "age of the said Sir *John* of one hundred and fifty pounds: "And therefore he brings this suit, *&c.*

Plea. "And now at this day, to wit, *Wednesday* next after fif-"teen days from the day of *Easter* in this same term, un-"til which day the said *Joshua* had leave to imparl to the "said bill, and then to answer, *&c.* before the lord the "king at *Westminster*, comes as well the said Sir *John* "*Dalston*, knight and baronet, by his attorney aforesaid, "as the said *Joshua* by *William Midgeley* his attorney, and "the said *Joshua* defends the force and injury when, *&c.*, "and saith that he is not thereof guilty. And of this he "puts himself upon the country, and the said Sir *John* "*Dalston* does so likewise, *&c.* Therefore let a jury come "thereupon before the lord the king at *Westminster*, on "*Tuesday* next after one month from the day of *Easter*, "and who neither, *&c.*, to recognize, *&c.*, because as well, "*&c.* The same day is given to the said parties there, *&c.*"

Pleas before our Lady the Queen at Westminster, *of the Term of* St. Michael *in the Second Year of the Reign of our Lady* Anne, *now Queen of* England, *&c. Roll* 398.

THE EARL OF BANBURY *against* WOODS AND HIS WIFE.

Salk. 5. 6 Mod. 34. 3 Salk. 26. Holt 41. S. C.

London, to wit. "*THOMAS Woods* merchant, and *Mary* his "wife, were attached to answer *Charles* Earl of "*Banbury* and *Mary* Countess of *Banbury* his wife, in a "plea, why they took the said Countess, and her so "taken detain, *&c.* And whereupon the said Earl and "Countess, by *Richard Longford* their attorney, complain, "that the said *Thomas Wood* and *Mary* his wife, on the "twentieth day of *April*, in the second year of the reign "of our Lady *Anne*, now Queen of *England*, *&c.*, at "*London* aforesaid, to wit, in the parish of *St. Helen* in "the ward of *Bishopsgate*, the said countess took, and her

"so taken do yet hold and detain: Wherefore they say "they are injured, and have damages to the value of ten "thousand pounds: And they bring this suit, *&c.*

"And the said *Thomas Woods* and *Mary* his wife, by *Richard Ash* their attorney, come and crave *oyer* of the original "writ aforesaid, and of the return of the same writ; and "they are read to them in these words, to wit, *Anne*, by "the grace of God, of *England*, *Scotland*, *France*, and "*Ireland*, Queen, Defender of the Faith, *&c.*, to the "sheriffs of *London*, greeting: Whereas we have oftentimes commanded you, that you should justly and with"out delay replevy *Mary* the wife of *Charles* Earl of *Banbury*, whom *Thomas Woods* merchant, and *Mary* his "wife took, and her so taken do detain, as it is said, un"less she was taken by the special command of us, or of "our Chief Justice, or for the death of any person, or for "our forest, or for any other guilt, wherefore accord"ing to the custom of *England*, she is not repleviable, "lest we should further hear claim thereof for defect of "justice; or that you would signify to us the cause why "you would not or could not execute our mandate for"merly to you thereupon directed: And you despising "our said precepts, as we have been informed, have not "hitherto taken care to replevy the said *Mary* the wife of "the said earl, or to signify unto us the cause why you "would not or could not do it; in manifest contempt of "us and our mandates, and to the great damage and "grievance of them the said earl and countess, whereat "we very much wonder and are moved. Still we com"mand and firmly enjoin you, that you replevy the said "*Mary* the wife of the said earl, according to the tenor "of our said mandates to you before directed for that "purpose, or that you yourselves be before us from the "day of *St. Michael* in one month, wheresoever we shall "then be in *England*, to show why our said mandates so "often to you directed, you have contemptuously refused "to execute. And have you there this writ. Witness our"self at *Westminster*, the twenty-second day of *June* in "the second year of our reign (*Cæsar*). By virtue of "this writ to us directed, we do certify that no other "writ or mandate of our said lady the queen, of reple"vying the within-named *Mary* the wife of *Charles* Earl "of *Banbury*, whom the within-named *Thomas Woods* "and *Mary* his wife have taken, and her so taken do de"tain, as within specified, than the writ of *pluries replevin* "of the said *Mary* the wife of *Charles* Earl of *Banbury*, "came to our hands, or was delivered to us. And fur"ther we do certify to the said lady the queen, that the "said *Mary*, the wife of *Cha les* Earl of *Banbury*, is re-

[706]

"moved afar off to places to us unknown, by the said "*Thomas Woods* and *Mary* his wife, wherefore we cannot "replevy the said *Mary* the wife of the said *Charles* Earl "of *Banbury*, as we are within commanded. The answer "of Sir *Gilbert Heathcote* and *Joseph Wolfe*, Esquire, "sheriffs.

"Which being read and heard, the said *Thomas Woods* "and *Mary* his wife demand judgment of the said writ, "because they say that by the form of the statute the ad-"dition of the village, or hamlet, or place, and county, of "the residence of the said *Thomas* ought to be contained "in the said original writ of the said *Charles* Earl of *Ban-*
[707] "*bury*, and *Mary* Countess of *Banbury* his wife: And this "they are ready to verify. Wherefore because such ad-"dition is not contained in the said writ, the said *Thomas* "and *Mary* pray judgment of the said writ, and that the "said writ be quashed, *&c.*

"And the said *Charles* Earl of *Banbury*, and the said "*Mary* Countess of *Banbury* his wife, say, that notwith-"standing any matter by the said *Thomas* and *Mary* his "wife above pleaded in abatement of the writ, the writ "of the said earl and countess ought not to be quashed, "because they say that the plea aforesaid, by the said "*Thomas* and *Mary* his wife pleaded in manner and form "aforesaid, and the matter in the same contained, are not "sufficient in law to quash the said writ of them the said "earl and countess. To which said plea they the same "earl and countess need not, neither are they in any man-"ner bound by the law of the land to answer; and this "they are ready to verify; wherefore for want of a suffi-"cient plea in behalf of them the said *Thomas* and *Mary* "his wife, they the said earl and countess demand judg-"ment, and that the writ of them the said earl and coun-"may be adjudged good, and that the said *Thomas* and "*Mary* may further answer to the said writ, *&c.*

"And the said *Thomas Woods* and *Mary* his wife say, "that the said plea by them the said *Thomas* and *Mary* in "manner and form aforesaid pleaded, and the matter "therein contained, are good and sufficient in the law to "quash the said writ of them the said earl and countess, "which said plea and the matter therein contained, they "the said *Thomas* and *Mary* are ready to verify, as the "Court, *&c.* And because the said earl and countess have "not answered to the said plea, nor have hitherto any "ways gainsaid it, they the said *Thomas* and *Mary*, as be-"fore, pray judgment of the aforesaid writ, and that the "same writ be quashed, *&c.*

"But because the Court of the said lady the queen now "here, is not yet advised of giving their judgment of and

" concerning the premises, day is therefore given to the " said parties before the lady the queen, until ..... where- " soever, &c., of hearing their judgment of and concern- " ing the said premises, because the Court of the said la- " dy the queen now here, is not yet thereof, &c."

Pleas before our Lady the Queen at Westminster, *of the Term of* St. Michael *in the First Year of the Reign of our Lady* Anne, *now Queen of* England, *&c. Roll* 344. [708]

HAYWOOD *against* DAVIES AND OTHERS.

Far. 104. Salk. 4. S. C.

Middlesex, to wit. " BE it remembered, That on *Friday* next " after three weeks from the day of *St. Mi-* " *chael* in this same term, before the lady the queen at " *Westminster*, comes *Rebecca Haywood* by *William Smyth* " her attorney, and brings into the court of the said lady " the queen now here her certain bill against *Margaret* " *Davis*, otherwise *Davison*, and *Mary Bonner* in custody " of the marshal, &c., of a plea of trespass, and there are " pledges of prosecuting, namely *John Doe* and *Richard* " *Roe*, which said bill followeth in these words, that is to " say, *Middlesex*, to wit, *Rebecca Haywood* complains of " *Margaret Davis*, otherwise *Davison*, and *Mary Bonner* " in the custody of the marshal of the Marshalsea of our " lady the queen, before the queen herself being, for that " they the same *Margaret* and *Mary*, on the first day of " *October*, in the first year of the reign of our lady *Anne*, " now Queen of *England*, &c., with force and arms, &c., " the close and court-yard of the said *Rebecca* in the parish " of *Stebunheath*, otherwise *Stepney*, in the county of *Mid-* " *dlesex* aforesaid, broke and entered, and her the said *Re-* " *becca*, in the quiet use and occupation of the said close " and court-yard, did then and there disturb and hinder; " and also for that they the same *Margaret* and *Mary* af- " terwards, to wit, the day and year aforesaid, with force " and arms, &c., another close and court-yard of the " same *Rebecca*, in the parish and county aforesaid, did " break and enter, and five hundred pails of water and " other water of the same *Rebecca*, to the value of twenty " shillings, from and out of a certain fountain of her the " same *Rebecca*, in the parish and county aforesaid being, " without the licence of her the said *Rebecca*, and against

Trespass for breaking and entering of the plaintiff's close and yard, and disturbing the possession.

"her will, from and out of the fountain aforesaid, then "and there did take and carry away; and also for that "they the same *Margaret* and *Mary* afterwards, to wit, "the same day and year last abovesaid, with force and

[709] "arms, *&c.*, a great quantity of dirt, soil, and water, in and "upon the land and another court-yard of the same *Rebecca* in the parish and county aforesaid, did then and there "put, place, pour out, and cast forth, and other enormities "to the same *Rebecca* did then and there commit, against "the peace of our said lady the queen that now is, and to "the damage of her the said *Rebecca* thirty and nine shillings: And therefore she brings this suit, *&c.*

Plea of attorney in common in abatement.

"And the said *Margaret* and *Mary* in their proper persons come and defend the force and injury, *&c.* and pray "judgment of the said bill of her the said *Rebecca*, and "that the same bill may be quashed, because they say "that the close and court-yard, and also the places in which "the said trespasses are supposed to be done, are, and at "the same time when, *&c.* were one acre of land, and that "the said *Rebecca* at the same time when, *&c.* had nothing "in the same acre of land, unless together and undividedly with the said *Mary Bonner*, who is in full life at "the parish of *Stepney* in the county of *Middlesex:* And "this they are ready to verify. Wherefore they pray "judgment of the said bill, and that the same bill may be "quashed, *&c.*

Replication.

"And the said *Rebecca* saith, that the aforesaid bill of "her the said *Rebecca*, for the reason before alleged, ought "not to be quashed, because she saith she, at the several "times the several trespasses aforesaid are supposed to be "committed, was sole seised of the said close and court-yard in the declaration of her the said *Rebecca* first mentioned, and also of the said close and court-yard in the "declaration aforesaid of her the said *Rebecca* secondly "mentioned, and of the aforesaid fountain in that declaration in like manner mentioned, and also of the third "court-yard in the said declaration of the said *Rebecca* "thirdly mentioned, and that the aforesaid *Margaret* and "*Mary*, at the said several times when, *&c.* did commit the

Traverse of the tenancy in common.

"several trespasses aforesaid, as the said *Rebecca* by her "said declaration above complains against them; without "that, that the said *Mary Bonner* at the respective times "aforesaid, or any of them, had any thing in the said premises, or any of them: And she prayeth that this may be "inquired by the country.

Demurrer.

"And the said *Margaret Davis*, otherwise *Davison*, "and *Mary Bonner* say, that the plea aforesaid by her "the said *Rebecca Haywood*, in manner and form above

"by their said replication pleaded, and the matter in the "same contained, are not sufficient in law to compel them "the said *Margaret* and *Mary* to answer the bill of her the "said *Rebecca*, to which said plea they the same *Margaret* "and *Mary* need not, neither by the law of the land are "they bound in any manner to answer: And this they are "ready to verify. Wherefore for want of a sufficient re-"plication of the said *Rebecca* in this behalf, they the said "*Margaret* and *Mary* as before pray judgment of the said "bill of her the said *Rebecca*, and that the same bill may "be quashed. And for causes of demurrer in law in this [710] "behalf, according to the form of the statute in such case "lately made and provided, the said *Margaret* and *Mary* "here shew to the Court these causes following; For that "the said plea of her the said *Rebecca* is double, uncer-"tain, and wants form, and concludes to the country.

Joinder in demurrer.

"And the said *Rebecca Haywood* saith, that the plea "aforesaid, by her the said *Rebecca* in manner and form "aforesaid in her replication above pleaded, and the mat-"ter in the same contained, are good and sufficient in law "to compel them the said *Margaret Davis* and *Mary Bon-"ner* to answer the bill aforesaid of her the said *Rebecca;* "which said plea, and the matter in the same contained, "the same *Rebecca* is prepared to verify and prove as the "Court, *&c.* And because the said *Margaret* and *Mary* "have not answered that plea, nor have hitherto in any-"wise contradicted it, the same *Rebecca* prays judgment; "and that the said *Margaret* and *Mary* may further answer "the said bill of her the said *Rebecca, &c.* But because "the Court of our said lady the queen now here, are not "yet advised of giving their judgment of and concerning "the premises, a day therefore is given to the said par-"ties before our lady the queen at *Westminster* until *Tues-"day* next after eight days from the day of *St. Martin*, for "hearing their judgment of and concerning the premises, "for that the Court of our said lady the queen now here is "not yet thereof, *&c.*

"A *Respondeas ouster* awarded."

Pleas before our Lady the Queen at Westminster, *in the Term of* Saint Michael *in the Fifth Year of the Reign of our Lady* Anne, *now Queen of* Great Britain, *&c. Roll* 439.

STROUD *against* LADY GERRARD.

Salk. 8. S. C.

Middlesex, to wit. "BE it remembered, That on *Wednesday* "next after three weeks from the day of "*Saint Michael* in this same term, before our lady the "queen at *Westminster*, cometh *Thomas Stroud* by *Daniel* "*Brown* his attorney, and produceth in the court of our "lady the queen that now is here his certain bill against [711] "the lady [or dame] *Elizabeth Gerrard*, otherwise *Gar*-"*rett*, in the custody of the marshal, *&c.* of a plea of "trespass upon the case, and there are pledges of prose-"cuting, to wit, *John Doe* and *Richard Roe*, which said "bill followeth in these words, to wit, *Middlesex*, to wit, "*Thomas Stroud* complains of the lady *Elizabeth Gerrard*, "otherwise *Garrett*, in the custody of the marshal of the "*Marshalsea* of our lady the queen before the queen her-"self being; for that, to wit, that whereas the said "*Elizabeth* on the 10th day of *October* in the fifth year "of the reign of our lady *Anne*, now queen of *England*, "*&c.* at the parish of *St. Clement Danes* in the county of "*Middlesex* aforesaid, was indebted to the said *Thomas* in "fifteen pounds of lawful *English* money, as well for "divers mason's works by him the said *Thomas* for the "aforesaid *Elizabeth* at the special instance and request of "the said *Elizabeth* before then made and performed, as "for stone and other materials and necessaries in and "about the doing and performing the said works used "and employed by him the said *Thomas*, at the like in-"stance and request of the said *Elizabeth* found and pro-"vided; and being so thereupon indebted, she the same "*Elizabeth* in consideration thereof undertook, and did "then and there faithfully promise the said *Thomas* that "she the said *Elizabeth*, when thereafter required so to "do, would well and faithfully pay and satisfy the said "fifteen pounds to the said *Thomas*: And whereas also "the said *Thomas*, afterwards, to wit, the same day and "year abovementioned, at the parish aforesaid in the "county aforesaid, at the like instance and request of the "same *Elizabeth* had done and performed for the afore-"said *Elizabeth* divers other mason's works, and had "found and provided and used stones and other materials

Indebitatus assumpsit for mason's work and materials found.

Quantum meruit for the same.

"and things necessary in and about the doing and per-
"forming of the said works last mentioned; the said *Eliz-*
"*abeth* in consideration thereof, afterwards, to wit, the
"same day and year aforesaid, at the parish aforesaid in
"the county aforesaid, undertook, and then and there
"faithfully promised the said *Thomas*, that she the same
"*Elizabeth* would well and truly pay and satisfy to the
"said *Thomas*, when she should afterwards be requested
"the same, as well so much money as the same *Thomas*
"should reasonably deserve to have for the said other
"mason's works last mentioned, at the time of the doing
"and performing the same, as also so much money as the
"aforesaid stones and other materials and things neces-
"sary last mentioned, at the time of the finding and pro-
"viding of the same were reasonably worth: And the said
"*Thomas* in fact saith, that he the said *Thomas*, for the
"said mason's works last mentioned, at the time of doing
"and performing the same, reasonably deserved to have
"other fifteen pounds of like lawful *English* money; and
"that the said stones and other materials and things ne-
"cessary last mentioned at the time of the finding and
"providing of them were reasonably worth other fifteen
"pounds of like lawful *English* money, to wit, at the pa- [712]
"rish aforesaid in the county aforesaid, of which the said
"*Elizabeth* then and there had notice: And whereas also
"the said *Elizabeth*, afterwards, to wit, the same day and
"year abovesaid, at the parish aforesaid in the said county,
"was indebted to the said *Thomas* in other fifteen pounds
"of like lawful *English* money, as well for other mason's
"work for the said *Elizabeth*, by the same *Thomas*, at the
"like special instance and request of the same *Elizabeth*,
"before that time wrought and done, as for divers mate-
"rials and things necessary, used in and about the same
"work by the aforesaid *Thomas*, at the like instance and
"request of the said *Elizabeth*, before then bought, found,
"and provided, as for divers sums of money, for the said
"*Elizabeth*, by the same *Thomas*, at the like instance and
"request of her the said *Elizabeth*, before that time laid
"out and disbursed; and being so indebted to the said
"*Elizabeth* afterwards, to wit, the day and year aforesaid,
"at the parish aforesaid in the county aforesaid, in consi-
"deration thereof undertook, and then and there did faith-
"fully promise the said *Thomas*, that she the same *Elizabeth*
"would well and faithfully pay and satisfy the said last-
"mentioned fifteen pounds to the aforesaid *Thomas*, when
"she should be thereunto afterwards requested: And
"whereas also the said *Elizabeth* afterwards, to wit, the
"same day and year above mentioned, at the parish afore-

Indebitatus assumpsit as well for mason's work as materials.

" said the county aforesaid, in consideration that the said " *Thomas*, at the like special instance and request of the

Indebitatus assumpsit for work.

" said *Elizabeth*, had wrought and done for the same *Elizabeth* other work belonging to a mason, [or mason's work,] " took upon herself, and then and there did faithfully pro- " mise the said *Thomas*, that she the same *Elizabeth* would " well and truly pay and satisfy twenty pounds of the like " lawful money of *England*, for the said last mentioned work " by the same *Thomas* for the said *Elizabeth* so wrought and " done as aforesaid, to the same *Thomas*, when thereunto af-

Breach.

" ter required: Yet the said *Elizabeth* her several promises " and assumptions aforesaid in nowise regarding, but con- " triving and fraudulently intending the same *Thomas* in " this behalf craftily and subtilly to deceive and defraud, " the aforesaid several sums of money, or any part thereof, " hath not yet paid to the said *Thomas*, (although the said " *Elizabeth* by the said *Thomas* afterwards, to wit, the " twelfth day of *October* in the fifth year aforesaid, at the " parish aforesaid, in the county aforesaid, and oftentimes " afterwards, was required so to do,) but hath hitherto al- " together refused, and still doth refuse to pay him the " same. Wherefore the said *Thomas* saith that he is in- " jured, and hath damage to the value of sixty pounds: " And therefore he brings this suit, *&c.*

Misnomer pleaded in abatement.

" And the Lady *Honor Gerrard*, against whom the afore- " said *Thomas* exhibited his bill by the name of the Lady " *Elizabeth Gerrard*, otherwise *Garret*, in her proper per- " son comes and defends the force and injury, *&c.*, and " prays judgment of the said bill, because she saith that

[713]

" she was baptized by the name of *Honor*, to wit, at the " parish of *St. Clements Danes* aforesaid, and by the same " name hath been always from her baptism to this time

Traverse.

" known and called; without that, she the said *Honor* " now is, or ever was known or called by the name of " *Elizabeth*, as by the bill aforesaid is above supposed: " And this she is prepared to verify: Wherefore she prays " judgment of the aforesaid bill, and that the said bill " may be quashed.

" And the said *Thomas Stroud* prays a day to imparle to " the plea aforesaid; and it is granted to him, *&c.* And here-

Repl.

" upon a day is given to the said parties before our Lady " the queen at *Westminster*, until *Thursday* next after eight

Imparlances for the plaintiff.

" days from the day of *St. Hilary*, that is to say, for the " aforesaid *Thomas* to imparle to the aforesaid plea, and " then to reply, *&c.* At which day before our Lady the " queen at *Westminster* came as well the said *Thomas Stroud* " by his attorney aforesaid, as the said defendant in her " proper person; and the said *Thomas* prays a further day

"to imparle to the aforesaid plea; and it is granted to "him, &c.; and upon this a further day is given to the said "parties before our lady the queen at *Westminster*, until "*Wednesday* next after fifteen days from the day of *Easter*, "that is to say, for the said *Thomas* to imparle to the "aforesaid plea, and then to reply, &c. At which day, "before the lady the queen at *Westminster*, cometh as well "the said *Thomas Stroud* by his attorney aforesaid, as the "aforesaid defendant in her proper person: And the said "*Thomas* saith, that the said Lady *Gerrard*, otherwise "*Garret*, the person against whom the said *Thomas* exhibited the said bill by the name of Lady *Elizabeth Gerrard*, otherwise *Garret*, to his aforesaid plea ought not to "be admitted to quash the said bill of the said *Thomas*, "because he saith that she the said Lady *Gerrard*, other- "wise *Garret*, the person against whom the said *Thomas*, "in the term of *St. Michael* last past, exhibited his said "bill by the name of the Lady *Elizabeth Gerrard*, other- "wise *Garret*, in this said term of *St. Michael*, put in com- "mon bail in court here, at the suit of the said *Thomas*, "in the plea aforesaid, by the name of Lady *Elizabeth* "*Garret*, as by the record thereof remaining in the same "court of our said lady the queen before the queen her- "self at *Westminster* more fully appeareth: And this he is "prepared to verify by the said record: Wherefore he "prayeth judgment if the said Lady *Gerrard*, otherwise "*Garret*, the person against whom the same *Thomas* ex- "hibited his said bill by the name of Lady *Elizabeth Ger-* "*rard*, otherwise *Garret*, ought to be admitted to her said "plea to the quashing of his said bill against the said re- "cord, &c.

Replication by way of estoppel, that the defendant put in bail by the name of Eliz.

"And the aforesaid *Honor Gerrard*, against whom the "aforesaid *Thomas* exhibited his bill aforesaid by the name "of Lady *Elizabeth Gerrard*, otherwise *Garret*, saith, that "the aforesaid plea by the said *Thomas* in manner and "form aforesaid above in his replication pleaded, and the "matter in the same contained, are not sufficient in law "to compel her the said *Honor* to answer the said bill of "him the said *Thomas*: To which said plea she the same "*Honor* need not, nor is by the law of the land obliged in "any manner to answer: And this she is ready to verify: "Wherefore for default of a sufficient replication in this "behalf, she the said *Honor*, as before, prays judgment of "the said bill, and that the same bill may be quashed, &c.

Demurrer.

[714]

"And the said *Thomas* saith, that the said plea by the said "*Thomas* in manner and form aforesaid above in his re- "plication pleaded, and the matter therein contained, are "good and sufficient in law to compel the said *Elizabeth* "to answer to the aforesaid bill of the said *Thomas* there-

Joinder.

"upon against the said *Elizabeth:* Which said plea, and "the matter in the same contained, the said *Thomas* is "prepared to verify and prove, as the Court, *&c.* And "because the said *Elizabeth* hath not answered, nor hath "hitherto in anywise contradicted it, he the same *Thomas*, "as before, prayeth judgment, and that the said *Elizabeth* "be compelled to answer to the aforesaid bill of the said "*Thomas, &c.* But because the Court of our said lady "the queen now here are not advised of giving their judg-"ment of and concerning the premises, day therefore is "given to the aforesaid parties before our lady the queen "at *Westminster*, until . . . . day next after . . . . of "hearing their judgment of and concerning the said pre-"mises; for that the Court of our said lady the queen now "here is not yet thereof, *&c.*"

Pleas before our Lord the King at Westminster, *of the Term of the* Holy Trinity *in the Tenth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 763.

JOHNSON *against* LONG.

[3 Ld. Raym. Entries 389. S. C.]

Salk. 10. Carth. 455. S. C.

Declaration for a nusance.

Somerset, to wit. "BE it remembered, That heretofore, to wit, "in the term of *St. Michael* last past, before "the lord the king at *Westminster*, came *Timothy John-"son* by *Philip Hodges* his attorney, and brought into the "court of our said lord the king then there, his certain "bill against *John Long*, in the custody of the marshal, "*&c.*, of a plea of trespass upon the case, and there are "pledges of prosecuting, to wit, *John Doe* and *Richard* "*Roe*, which said bill followeth in these words, to wit,

[715]

"*Somerset*, to wit, *Timothy Johnson* complains of *John* "*Long*, in the custody of the marshal of the Marshalsea "of the lord the king that now is, before the king himself "being, for that, to wit, That whereas the said *Timothy*, "on the twenty-first day of *April* in the eighth year of the "reign of our Lord *William* the Third now King of *Eng-"land*, *&c.*, and ever after to this time, was possessed and "still is possessed of a certain ancient work-house, situate "and being in the parish of *Whatley* in the county afore-"said, in which work-house on the same twenty-first day

"of *April* in the eighth year aforesaid, and from time "whereof the memory of man is not to the contrary, there "was a certain ancient window in the west part of the "same work-house, through which a very wholesome air "and a chearing light entered and came in, and used and "was accustomed to enter and come in on the same twen-"ty-first day of *April* in the eighth year aforesaid, and for "all the time aforesaid, to the great benefit and advantage "of the occupiers of the said work-house: And whereas "the said *John* on the first day of *April* in the eighth year "aforesaid, and always afterwards to this time, had been "possessed, and doth still remain possessed of a certain "parcel of land, with the appurtenances, situate, lying, "and being in the parish of *Whatley* aforesaid in the coun-"ty aforesaid, lying contiguous to the aforesaid work-"house, and being so possessed thereof, the said *John* con-"triving and fraudulently intending many ways to burthen "and oppress the said *Timothy*, and altogether to deprive "him the said *Timothy* of the air and light which into the "work-house aforesaid through the window aforesaid "used and was accustomed to enter and come in, and to "stop up the aforesaid work-house with horrid darkness, "and altogether to deprive the said *Timothy* of the use and "advantage of the said work-house, on the first day of "*April* in the eighth year aforesaid, at *Whatley* aforesaid, "in the county aforesaid, erected and built anew a cer-"tain wall upon the said parcel of land of the said *John*, "so near the said work-house, that by the same erection of "the wall aforesaid, the said window on the said twenty-"first day of *April*, and always after, to the day of exhibit-"ing this bill, to wit, the twenty-third day of *October* in the "ninth year of the reign of our said lord the now king, was "very much stopped up and darkened, whereby the same "*Timothy* totally lost and was deprived of the whole advan-"tage and easement of the said window, and the comfort "and wholesomeness of the air and light which used to en-"ter and come in and upon the said window as aforesaid, "and the whole use and profit of the said work-house "from the said twenty-first day of *April* in the eighth year "aforesaid, to the aforesaid twenty-third day of *October* in "the ninth year aforesaid: Wherefore the said *Thomas* "saith, that he is prejudiced and damnified to the value of "forty pounds: And thereupon he brings this suit, &c.

Possession alleged in an old work-house, wherein was a window time out of mind.

Defendant's possession in a piece of land adjoining thereto.

Defendant obstructed the light, whereby the plaintiff lost the benefit of his shop.

[716]

Imparlance.

"And now at this day, to wit, *Friday* next after the "morrow of the *Holy Trinity* in this same term, until "which day the said *John Long* had leave to imparle to "the said bill, and then to answer, &c. before our lord "the king at *Westminster* comes as well the said *Timothy* "by his attorney aforesaid, as the said *John* by *Jacob Long*

Pleads another action and recovery for the same nuisance in bar.

Setting forth a former declaration.

"his attorney, and the said *John* defends the force and injury, when, &c. And saith that the said *Timothy* ought "not to have or maintain his said action thereupon against "him, because he saith that the aforesaid *Timothy* hereto-"fore, to wit, in *Easter* term in the eighth year of the reign "of our said lord the king, that now is, in the court of the "said lord the king, before the king himself here, to wit, "at *Westminster*, in the county of *Middlesex*, impleaded the "same *John Long* in a certain plea of trespass upon the "case, declaring against him, That whereas the same "*Timothy* on the tenth day of *October* in the seventh year "of the reign of our lord the king that now is, and always "afterwards until that time, had been, and then was pos-"sessed of a certain ancient work-house, situate and being "in the parish of *Whatley* in the county aforesaid, and that "in that work-house on the same tenth day of *October* in "the seventh year abovesaid, and from time whereof the "memory of man was not then to the contrary, there was a "certain ancient window in the west part of the said work-"house, and that through the same window the most "wholesome air and light entered and came in on the same "tenth day of *October* in the seventh year aforesaid, and "for the whole time abovesaid entered and came in, "and was used and accustomed to enter and come in, to "the great benefit and advantage of the occupiers of the "said work-house; and that the said *John* on the said "tenth day of *October* in the seventh year aforesaid, and "always afterwards until that time, had been possessed, "and then was possessed of a certain parcel of land with "the appurtenances, situate, lying, and being in the par-"ish of *Whatley* in the county aforesaid, lying contiguous-"ly to the aforesaid work-house; and being so possessed "thereof, the said *John* contriving and fraudulently intend-"ing many ways to burden and oppress the said *Timothy*, "and altogether deprive him the said *Timothy* of the air "and light which used and was accustomed to come and "enter into the said work-house through the window afore-"said, and to stop up the work-house aforesaid with terri-"ble darkness, and wholly to deprive the said *Timothy* of "the use and advantage of the said work-house, on the "said tenth day of *October* in the seventh year aforesaid, at "*Whatley* aforesaid in the county aforesaid, did newly "erect and build a certain wall upon the said parcel of "land of him the said *John*, so near the said work-house "that by the same erection of the wall aforesaid, the afore-"said window, on the said tenth day of *October*, and al-"ways afterwards until the twentieth day of *April* in the

[717] "eighth year of the reign of the now king, was very much "stopped up and darkened, whereby the said *Timothy* to-

"tally lost and was deprived of the whole advantage and "easement of the said window, and the comfort and "wholesomeness of the air and light, which in and through "the said window aforesaid was accustomed to enter and "come in, and the whole use and profit of the said work-"house from the said tenth day of *October* in the seventh "year aforesaid, unto the said twentieth day of *April* in the "eighth year aforesaid: Wherefore the said *Timothy* then "said that he was injured, and had received damage to "the value of forty pounds. And thereupon he then "brought his suit, *&c.* And there were such proceedings "thereupon in the same court here, to wit, at *Westminster* "aforesaid, after that the said *John* had there pleaded there-"unto, that he was not thereof guilty, and by a certain ju-"ry of the country had been thereof found guilty, That "afterwards, to wit, in the term of St. *Michael* then next "following, by the same court here, it was considered, "that the said *Timothy* should recover against the said "*John* fourteen pounds for his damages which he had sus-"tained as well by occasion of the premises in the same "record mentioned, as for his costs and damages by him "about his suit in that behalf laid out, as by the record "thereof remaining in the same court here, to wit, at *West-"minster* aforesaid, more fully appears. And the same "*John* further saith, that the aforesaid work-house, win-"dow, erection, and building of the wall aforesaid, in the "said recited record mentioned, and the aforesaid work-"house, window, erection, and building of the wall afore-"said, in the bill of the said *Timothy* against him the said "*John Long* now exhibited and abovementioned and ex-"pressed, are the same work-house, window, erection, "and building of the wall, and not other nor different; and "that the aforesaid *Timothy* in the above recited record "named plaintiff, and the aforesaid *Timothy* above in the "said bill named plaintiff, are one and the same person, "and not another nor different; and that the aforesaid "*John* in the said recited record named defendant, and "the aforesaid *John* in the said bill above named defend-"ant, are one and the same person, and not another nor "different: And this he is ready to verify. Whereupon "he prays judgment if the aforesaid *Timothy* ought to have "or maintain his said action against him, *&c.*

Judgment in the former proceedings.

Averment of the identity.

"And the said *Timothy* saith, that he, notwithstanding "any matter by the said *John* above in pleading alleged, "ought not to be precluded from having his said action "thereupon against him the said *John;* because he saith, "that the plea aforesaid by the said *John* in manner and "form aforesaid above pleaded, and the matter therein

Demurrer.

"contained, are not sufficient in the law to preclude the "same *Timothy* from having his said action thereupon "against the said *John;* to which said plea he the same "*Timothy* hath no necessity, neither by the law of the [718] "land is bound in any mannerr to answer: And this he is "ready to verify. Whereupon for default of a sufficient "answer in this behalf, the same *Timothy* prays judgment, "and his damages by occasion of the premises aforesaid "to be to him adjudged, *&c.*

Joinder.

"And the aforesaid *John* saith, that the said plea by "him the said *John*, in manner and form aforesaid above "pleaded, and the matter in the same contained, are good "and sufficient in the law to preclude the said *Timothy* "from having his said action thereupon against him the "said *John*, which said plea, and the matter in the same "contained, he the same *John* is ready to verify and prove "as the Court, *&c.* And because the said *Timothy* hath "not answered to the said plea, nor hitherto any ways "contradicted it, he the said *John*, as before, prays judg-"ment, and that the said *Timothy* be debarred of having "his said action against him the said *John*. But because "the Court of the said lord the king now here are not yet "advised of giving their judgment in and concerning the "premises, a day is thereupon given to the parties afore-"said, before the said lord the king at *Westminster*, until "*Wednesday* next after eight days from the day of St. *Mar-"tin*, of hearing their judgment therein, for that the Court "of the said lord the king now here is not yet thereupon, "*&c.* At which day, before the lord the king at *Westmin-"ster*, come the said parties by their said attornies; upon "which all and singular the premises being seen, and by "the Court of the lord the king now here more fully un-"derstood, and mature deliberation thereupon had, it "seems to the Court of the lord the king here, that the "plea aforesaid by said *John*, in manner and form afore-"said above pleaded, and the matter in the same contain-"ed, are good and sufficient in law to debar the said *Tim-"othy* from having his said action against the said *John*. "Therefore it is considered, that the said *Timothy* take "nothing by his said bill, but that he for his false com-"plaint be thereupon in mercy, *&c.*, and that the said *John* "go then without a day, *&c.* And it is further considered, "that the aforesaid *John* recover against the said *Timothy* "six pounds and ten shillings for his costs and charges in "and about his defence in this behalf sustained, adjudged "by the Court of the said lord the king now here, to the "said *John*, by his assent, according to the form of the "statute in such case made and provided; and that the "aforesaid *John* have execution thereof." *&c.*

Continuance. · Judgment for the defendant.

Pleas before our Lord the King and our Lady the Queen at Westminster, *of the Term of* Easter *in the Second year of the Reign of our Lord* William *and our Lady* Mary, *now King and Queen of* England. *Roll* 43.

PAYNE *against* PARTRIDGE AND ANOTHER.

[3 Ld. Raym. Entries 439. S. C.]

3 Mod. 289. 1 Show. 243, 255. Salk. 12. Comb. 180. Carth. 191. Holt 6. S. C.

Cambridgeshire, to wit. "BE it remembered, That heretofore, "to wit, in the term of St. *Michael* last "past, before our lord the king and our lady the queen at "*Westminster*, came *Isaac Payne*, by *Humphrey Ambler* his "attorney, and brought into the court of our said lord the "king and lady the queen, then there, his certain bill "against *Edward Partridge*, Esq. and *William Boulter*, in "the custody of the marshal, *&c.*, of a plea of trespass "upon the case; and there are pledges of prosecuting, to "wit, *John Doe* and *Richard Roe*, which said bill followeth "in these words, that is to say, *Cambridgeshire*, to wit, "*Isaac Payne* complains of *Edward Partridge*, Esq. and "*William Boulter*, in the custody of the marshal of the "*Marshalsea* of our lord the king and lady the queen, be- "fore the said king and queen being, for that, to wit, "that whereas the village of *Littleport* within the isle of "*Ely* in the county aforesaid, is, and from all the time "whereof the memory of man is not to the contrary, was "an ancient village, and whereas within the said village "of *Littleport* aforesaid there is, and for all the said time "was, an ancient river called *Wilney* river, and upon the "same river, and across the same from the whole time "abovesaid, there was an ancient passage [or ferry] at "the north-east side of the same village of *Littleport*, near "the end of a lane called *Ferry-lane*, leading from the vil- "lage of *Littleport* aforesaid to the said river, for the pass- "ing and carrying over of the subjects of this realm of "*England*, desiring to pass over and beyond the said river, "to wit, from a certain place called the *Ferry-lane*, from "the north-east part thereof to a certain place called *Ad- "venturous Bank* from the north-east part of the same river "overthwart that river, either forward or backward, at "their will, for the passing over and transporting of their "horses, mares, and geldings, which said passing over and "transporting from the whole time abovesaid until of late, "to wit, the first day of *May* in the fifteenth year of our

Declaration by an inhabitant of Littleport against the proprietors of a ferry boat for not keeping it in repair.

Prescription in a ferry and toll for passage.

" lord *Charles* the Second, late King of *England*, &c., were
" had and performed in a ferry-boat there kept by the
" proprietors and occupiers of the said passage [or ferry];
[720] " and the proprietors, occupiers, and keepers of the said
" passage [or ferry] and ferry-boat for the time being, for
" the better keeping and maintaining the same, from the
" whole time aforesaid, took, and were accustomed to take,
" of the said subjects of this realm of *England*, so to be
" passed and transported over and beyond the said river,
" to wit, from the aforesaid place called the *Ferry-lane* to

Exception of inhabitants in ancient messuages from paying toll.

" the aforesaid place called *Adventurous Bank*, across the
" said river, (other than of the inhabitants of the said vil-
" lage of *Littleport*, residing in ancient messuages or an-
" cient cottages there,) certain reasonable rates, as toll or

The several tolls taken.

" custom, to wit, one halfpenny for every horse and man
" thereupon riding, and for every led horse, mare, or geld-
" ing, one farthing; and for every horse, mare, or gelding,
" otherwise loaded, one penny for such passing and tran-
" sporting of them as aforesaid, to be received every time
" of their passing over beyond the river aforesaid, at the
" passage [or ferry] aforesaid, either forward or backward:

Prescription of exemption for the inhabitants in the ancient messuages and cottages for free passage.

" And whereas also within the same village of *Littleport*
" there is, and from the whole time aforesaid, whereof the
" memory of man is not to the contrary, there was such
" an ancient custom, to wit, that the inhabitants of that
" village in ancient messuages or ancient cottages there
" residing, had and might have, and from the whole time
" aforesaid were accustomed to have, liberty of passing
" over the said river at the aforesaid passage there, for
" themselves, their horses, mares and geldings in the ferry-
" boat aforesaid, so as aforesaid to be transported either
" forward or backward, at their pleasure, without any pay-
" ment whatsoever for such their passing over so to be

That the plaintiff is an inhabitant in an ancient messuage.

" had: And whereas also the said *Isaac*, on the first day of
" *May* in the second year of the reign of our lord *James* the
" Second, late king of *England*, and long before and from
" thence afterwards to this time was, and still remains
" one of the inhabitants of the aforesaid village of *Little-*
" *port*, and then and still residing in a certain ancient
" messuage there, and for that cause and reason he the
" said *Isaac*, by virtue of the said custom, had and hath a
" right, and ought to have the liberty of passing over the
" said river at the passage aforesaid, in the ferry-boat
" aforesaid, for himself, his horses, mares, and geldings in
" form aforesaid, without any payment whatsoever for the

Breach in not keeping the boat.

" same to be made. Nevertheless the said *Edward* and
" *William* not being ignorant of the said custom, but
" contriving and maliciously intending him the said *Isaac*

" illegally to burden and greatly to damnify, and to de-
" prive him of the liberty of his aforesaid passing over the
" said river to be had at the passage aforesaid in the said
" ferry-boat as aforesaid, and also to cause him the said
" *Isaac* entirely to lose the same, on the said first day of
" *May* in the second year abovesaid, and from thence to
" the day of exhibiting the said bill of the said *Isaac* (the
" same *Edward* and *William*, then and before and after-
" wards to this time being proprietors, occupiers, and
" keepers of the passage [or ferry] and ferry-boat afore-
" said) had or preserved, or kept no ferry-boat at the said
" passage [or ferry] for the passing over of the subjects of
" this realm, and their horses, mares, and geldings afore- [721]
" said, willing to pass over and beyond the said river, but
" have for the time aforesaid totally omitted and neglect-
ed to do, have, preserve, or keep the same, and no ferry-
" boat for the time aforesaid, or any part of that time,
" was or yet is, although the said *Edward* and *William*, on
" the said first day of *May* in the second year abovesaid,
" and often afterwards, at *Littleport* aforesaid, were re-
" quested by the said *Isaac* to have such ferry-boat at the
" passage aforesaid, and to permit him the said *Isaac* to
" enjoy his said liberty there; so that the said *Isaac* from
" the aforesaid first day of *May* in the second year above-
said, and from thence to this time was, and yet is hin-
dered and wholly deprived of his liberty of passing over
the river aforesaid at the said passage in form aforesaid,
according to the custom aforesaid to be had, contrary
to the said custom, and to the damage of him the said
Isaac of five hundred pounds. And thereupon he brings
" this suit, &c.

" And now at this day, to wit, *Wednesday* next after fif- Imparlance.
" teen days from the day of *Easter* in this same term, to
" which day the said *Edward* and *William* had leave to
" imparl to the said bill and then to answer, &c. before
" the lord the king and lady the queen at *Westminster*,
" cometh as well the said *Isaac* by his said attorney, as the
" said *Edward* and *William* by *Joseph Sherwood* their at-
" torney; and the said *Edward* and *William* defend the
" force and injury, when, &c., and say that the aforesaid
" *Isaac* ought not to have or maintain his action afore-
" said thereupon against them; because protesting that Protestation that the passage was not in a boat.
" the passing and carrying of persons, horses, mares, and
" geldings, over and across the said river, were not had
" or done in any ferry-boat kept for the passing over and
transportation of persons or cattle in the place where,
" and in manner and form as by the declaration aforesaid Further protestation that there is no such custom;
" is above supposed: and protesting that within the said
" village of *Littleport* there is not, nor ever was any such

"custom as in the declaration aforesaid is above supposed "and alleged; and protesting also that the aforesaid *Isaac* "is not, nor ever was one of the inhabitants of the said "village of *Littleport*, residing in any ancient messuage "there in manner and form as by the aforesaid declara- "tion is above supposed, the said *Edward* and *William* for "plea say, that long before the said time in which, *&c.* "to wit, on the first day of *May* in the fifteenth year of "the reign of the said late king *Charles* the Second afore- "said, he the said *Edward*, at his own proper costs and "charges, erected, built, and placed, in and upon the said "river and overthwart the same river at the passage "aforesaid, a certain bridge made of wood and stones for "the use, easement of passing over, and transporting of "all and singular the persons, horses, mares, and geldings "there coming and willing to pass over and beyond the "said river at the passage aforesaid, which said bridge "there so erected and placed the same *Edward* there "from time to time, and at all times after the making "thereof to this time, hath well and sufficiently had, pre- "served, and maintained, repaired and kept, and still "hath, preserveth, maintaineth, and keepeth there, so that "the said *Isaac* and all and singular the persons, horses, "mares, and geldings there coming and willing to pass "over and beyond the said river at the passage aforesaid, "from time to time and at all times after the making and "placing of the aforesaid bridge there unto this time, "might and still may there go, return, and pass upon, by "and over the said bridge across and beyond the river "aforesaid, at the passage aforesaid, without any danger, "and more safely, better and sooner, than in a ferry-boat: "For which reason the said *Edward* and *William* had "preserved or kept no ferry-boat at the said passage, but "have omitted and neglected to do, have, preserve, or "keep the same, as they well might, for the cause afore- "said: And this they are prepared to verify. Where- "fore they pray judgment if the said *Isaac* ought to have "or maintain his action aforesaid thereupon against "them, *&c.*

protestation also, that the plaintiff was not an inhabitant in any old messuage.

Plea that at their own charge they built a bridge instead of a boat, and keep it in repair, more safe for passage than the boat.

[722]

For which reason they omitted to keep the boat.

"And the said *Isaac* saith, that he, notwithstanding any "thing by the said *Edward* and *William* above alleged, "ought not to be precluded from having his said action "thereupon against them, because he saith, that he the "said *Isaac* was not permitted to have the liberty of the "passage aforesaid, by any bridge over and beyond the "river aforesaid, according to the custom in the declara- "tion before-mentioned, against the custom aforesaid: "And this he is ready to verify. Wherefore he prays "judgment and his damages by occasion of the premises "to him to be adjudged, *&c.*

Reply, that he was not permitted to pass over any bridge.

"And the said *Edward* and *William* say, That the said "plea by the said *Isaac* in manner aforesaid above in his "replication pleaded, and the matter in the same con-"tained, are not sufficient in the law to have and main-"tain the aforesaid action of him the said *Isaac* against "them the said *Edward* and *William*, to which the said "*Edward* and *William* need not, nor are by the law of the "land in any manner bound to answer: And this they are "ready to verify. Wherefore, for default of a sufficient "replication in this behalf, the same *Edward* and *William* "as before pray judgment, and that the said *Isaac* be pre-"cluded from having the said action against them the said "*Edward* and *William*, *&c.* Demurrer.

"And the said *Isaac* saith, That the aforesaid plea by the "same *Isaac* in manner and form aforesaid, above in his "replication pleaded, and the matter in the same contain-"ed, are good and sufficient in the law to have and main-"tain the action of the said *Isaac* against them the said "*Edward* and *William*; which said plea and the matter "therein contained the same *Isaac* is ready to verify and "prove, as the Court, *&c.* And because the aforesaid *Ed-*"*ward* and *William* have not answered the said plea, nor "have hitherto any ways denied the same, he the said "*Isaac*, as before, prays judgment and his damages by oc-"casion of the premises to be adjudged to him, *&c.* Joinder.

"But because the Court of the said lord the king and "lady the queen now here are not yet advised of giving "their judgment of and concerning the premises, a day "therefore is given to the said parties before the lord the "king and the lady the queen, at *Westminster*, until *Fri-*"*day* next after the morrow of the *Holy Trinity*, of hear-"ing their judgment of and concerning the said pre-"mises; for that the Court of the said lord the king and "lady the queen now here thereof, are not yet, *&c.* At "which day, before the lord the king and lady the queen "at *Westminster*, come the said parties by their said at-"tornies. But because the Court of our lord the king "and lady the queen are not yet advised of giving their "judgment of and concerning the premises, a day there-"fore is given to the said parties before our lord the king "and lady the queen at *Westminster*, until *Thursday* next "after three weeks from the day of St. *Michael*, of hear-"ing their judgment thereupon, for that the Court of "our said lord and lady the now king and queen are not "yet thereof, *&c.* At which day, before the lord the "king and lady the queen at *Westminster*, come the par-"ties aforesaid by their said attornies. But because the "Court of the said lord the king and lady the queen now [723] Continuance.

" here are not yet advised of giving their judgment of and " concerning the premises, a day therefore is given to the " said parties before our lord the king and lady the queen " at *Westminster*, until *Friday* next after eight days from " the day of St. *Hilary*, of hearing their judgment, for that " the Court of the said lord the king and lady the queen " now here are not yet thereupon, *&c.* At which day, " before the lord the king and lady the queen at *Westmin-* " *ster*, come the aforesaid parties by their said attornies: " But because the Court of the said lord the king and la- " dy the queen, now here, are not yet advised of giving " their judgment of and concerning the premises, a day " therefore is given to the said parties before the lord the " king and lady the queen at *Westminster*, until *Wednesday* " next after fifteen days from the day of *Easter*, of hearing " their judgment thereupon, for that the Court of the said " lord the king and lady the queen now here are not yet " thereupon, *&c.* At which day, before the lord the king " and lady the queen at *Westminster*, come the aforesaid " parties by their said attornies: But because the Court of " the said lord the king and lady the queen now here are " not yet advised of giving their judgment of and con- " cerning the premises, a day therefore is given to the said " parties before the lord the king and lady the queen at " *Westminster*, until *Saturday* next after eight days from " the day of the *Holy Trinity*, of hearing their judgment " thereupon, for that the Court of the said lord the king " and lady the queen now here are not yet thereupon, *&c.* " At which day, before the lord the king and lady the " queen at *Westminster*, come the said parties by their at- " tornies aforesaid; upon which all and singular the pre- " mises being seen and more fully understood by the Court

Judgment for defendant.

[724]

" of the said lord the king and lady the queen now here, " and mature deliberation being thereupon had, it seems " to the Court of the said lord the king and lady the queen " now here, that the aforesaid plea by the aforesaid *Isaac*, " in manner and form aforesaid above in his replication " pleaded, and the matter in the same contained, are not " sufficient in the law to have and maintain the said action " of him the said *Isaac*, against the said *Edward* and *Willi-* " *am*: Therefore it is considered, that the said *Isaac* take " nothing by his said bill, but that for his false complaint " he be thereupon in mercy, *&c.* and that the aforesaid *Ed-* " *ward* and *William* go hence without a day." *&c.*

Pleas before our Lord the King at Westminster, *of the Term of* St. Hilary *in the Seventh Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 697.

HICKS *against* DOWLING.

[3 Ld. Raym. Entries 354. S. C.]

Somerset, to wit, "BE it remembered, That heretofore, to wit, "in the term of St. *Michael* last past, before our "lord the king at *Westminster*, came *Sarah Hicks* widow, "by *Thomas Callow* her attorney, and brought into the "court of our said lord the king then and there, his cer-"tain bill against *John Dowling*, in the custody of the mar-"shal, *&c.*, of a plea of trespass upon the case; and there "are pledges of prosecuting, to wit, *John Doe* and *Richard* "*Roe;* which said bill followeth in these words, that is to "say, *Somerset*, to wit, *Sarah Hicks* widow complains of "*John Dowling*, in the custody of the marshal of the *Mar-*"*shalsea* of our lord the king, before the king himself be-"ing, for that, to wit, That whereas the said *Sarah*, on "the twenty-sixth day of *January* in the year of our Lord "one thousand six hundred and ninety-two, was lawfully "possessed of and in a certain messuage, situate, lying, and "being in *East Dundry*, in the county aforesaid, for a cer-"tain term of years then and yet to come and unexpired; "and being so thereof possessed, the same *Sarah* on the "same day and year abovesaid, at *East Dundry* aforesaid, "demised the said messuage (among others) to the afore-"said *John Dowling*, to have and to hold to the same *John* "*Dowling*, from the twenty-fifth day of *March* then next fol-"lowing, for the term of three years, if the said *Sarah Hicks* "and *John Dowling*, and one *Thomas Dowling* and *Edith*, "the father and mother of him the said *John Dowling*, "should so long live; by virtue of which said demise, the "aforesaid *John Dowling* afterwards, to wit, on the twenty-"sixth day of *March* in the year of our Lord one thousand "six hundred and ninety-three, entered into the messuage "aforesaid, and thereof (among others) was possessed for "the said term of three years above to him demised, the "reversion thereof belonging to the same *Sarah*, for the "residue of the said term first above mentioned: And the "said *Sarah* in fact saith, that as well as the said *Thomas* "*Dowling* and *Edith*, as the aforesaid *John Dowling*, are

Salk. 13. Cases B. R. 100. S. C.

Declaration that she was lawfully possessed of a messuage for a term of years, and demised it for three years to the defendant, if such persons should so long live.

[725]

Defendant's entry and possession for his term, the reversion belonging to the plaintiff.

Averment of lives.

"yet in being and in full life, to wit, at *East Dundry* "aforesaid: Nevertheless the aforesaid *John Dowling*, "sufficiently knowing the premises, but contriving and "maliciously intending in this part very much to damnify "and burthen the said *Sarah*, he the said *John Dowling*, "on the twentieth day of *June* in the year of our Lord "one thousand six hundred and ninety-five, (being so as "aforesaid possessed of the messuage abovesaid, and the "reversion thereof belonging to the said *Sarah* in manner "before said,) did so negligently and improvidently keep "his fire in the messuage aforesaid, that by reason thereof "the same messuage was then burnt and totally destroy- "ed: Whereupon the said *Sarah* saith, that she is injured, "and hath damage to the value of five hundred pounds: "And therefore she brings this suit, *&c.*

Breach in negligent keeping his fire.

Imparlance.

"And now at this day, to wit, *Thursday* next after eight "days from the day of St. *Hilary* in this same term, until "which day the said *John* had leave to imparl to the said "bill, and then to answer, *&c.* before our lord the king at "*Westminster*, comes as well the said *Sarah* by her attor- "ney aforesaid, as the said *John* by *Samuel Brewster* his "attorney: And the same *John Dowling* defends the force "and injury, when, *&c.*, and saith that he is not thereof "guilty; and of this he puts himself upon the country; "and the aforesaid *Sarah* doth likewise, *&c.* Therefore "let a jury come thereupon before the lord the king at "*Westminster*, on *Wednesday* next after eight days from the "day of the purification of the blessed *Mary*, and who nei- "ther, *&c.* to recognize, *&c.* because as well, *&c.* The "same day is given to the said parties there."

Not guilty.

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[726]

Pleas before our Lord the King at Westminster, *of the Term of the* Holy Trinity *in the Ninth Year of the Reign of our Lord* William *the Third, now King of* England, *&c.* *Roll* 359.

TURBERVILE *against* STAMPE.

[3 Ld. Raym. Entries 375. S. C.]

Salk. 13, 647. Comb. 459. Carth. 425. Skin. 681. Cases

Dorset, to wit, "BE it remembered, That heretofore, to wit, "in the term of *Easter* last past, before our "lord the king at *Westminster*, came *Thomas Turbervile*

"the younger, Esq. by *Edward Lawrence* his attorney, and "brought into the Court of our said lord the king then "there, his certain bill against *John Stampe*, Gentleman, "in the custody of the marshal, *&c.*, of a plea of trespass "upon the case; and there are pledges of prosecuting, to "wit, *John Doe* and *Richard Roe;* which said bill followeth "in these words, that is to say, *Dorset*, to wit, *Thomas* "*Turbervile* the younger, Esq. complains of *John Stampe*, "Gent. in the custody of the marshal of the *Marshalsea* of "our lord the king, before the king himself being, for that, "to wit, That whereas according to the law and custom "of this realm of *England* hitherto used and approved, "every man of the same realm is obliged to keep his fire "safe and secure by day and by night, lest for want of the "due keeping of such fire any damage in any manner "happen to any person of the same realm; and whereas "the aforesaid *Thomas*, on the sixth day of *April* in the "ninth year of the reign of our lord *William* the Third, "now king of *England*, *&c.*, was possessed of a certain "close of heath lying and being in the parish of *Stoke* in "the county aforesaid; And whereas also the said *John*, "on the day and year abovesaid, was in like manner pos-"sessed of a certain other close of heath, next adjoining "to the said close of heath of him the said *Thomas*, in "the parish and county aforesaid, the said *John*, on the "day, year, and place abovesaid, so negligently and im-"providently kept his fire in the said close of heath of "him the said *John*, that for default of the due keeping of "the said fire, the heath and furzes of the said *Thomas*, to "the value of forty pounds, in the said close of heath of "him the said *Thomas* then growing and being, were "burnt, to the great damage of the said *Thomas*, and con-"trary to the custom aforesaid: Wherefore he saith that "he is injured and hath damage to the value of forty "pounds: And thereupon he brings this suit, *&c.*

B. R. 151. Holt 9. S. C.

Declaration upon the custom of the realm, for negligently keeping a fire in the defendant's close, whereby the plaintiff's heath and furzes were burnt.

[727]

"And now at this day, to wit, *Friday* next after the "morrow of the *Holy Trinity* in this same term, until "which day the said *John* had leave to imparle to the "said bill, and then to answer, *&c.* before the lord the "king at *Westminster*, comes as well the said *Thomas* by "his said attorney, as the said *John* by *Samuel Brewster* "his attorney: And the said *John* defends the force and "injury, when, *&c.*, and saith that he is not thereof guilty; "and of this he puts himself upon the country; and the said "*Thomas* likewise, *&c.* Therefore let a jury thereupon "come before the lord the king at *Westminster*, on —— "day next after ——; and who neither, *&c.* to recog-

Not guilty, and issue.

Venire awarded.

"nize, &c. because as well, &c. The same day is given "to the said parties there, &c.

Nisi prius.

"Afterwards process being thereupon continued between the said parties of the aforesaid plea, by the jury's "being respited there between them thereupon, before "our lord the king at *Westminster*, until *Saturday* next "after three weeks from the day of *St. Michael*, unless the "justices of our lord the king assigned to take the assizes "in the county of *Dorset*, on *Thursday* the twenty second "day of *July*, at *Dorchester* in the county aforesaid, by the "form of the statute, &c. should first come for default of "jurors, &c. At which day, before the lord the king at "*Westminster*, cometh the said *Thomas Turbervile* the "younger, by his said attorney, and the said justices before whom, &c. have sent hither their record before "them, had in these words, to wit, Afterwards on the day "and place within contained, before Sir *Edward Ward*, "Knt. chief baron of the Exchequer of the lord the king, "and Sir *Thomas Rokeby*, Knt. one of the justices of the "lord the king assigned to hold pleas before the king him-"self, justices of our said lord the king assigned to take "assizes in the county of *Dorset*, by the form of the statute, "&c. came the within-named *Thomas Turbervile* the "younger, Esq. by his attorney within mentioned, and the "within-written *John Stampe*, Gent. although solemnly re-"quired, did not come, but made default: Therefore let the "jury, whereof mention is made, be taken against him by "default, and the jurors of that jury being summoned, "some of them, to wit, *Thomas Notting*, *Henry Kelloway*, "*Richard Hambourne*, *John Ford*, *David Hayward*, *Mark* "*Dowland*, *Henry Humber*, *James Squib*, *Robert Woolfrays*, "came and are sworn into that jury; and because the "rest of the jurors of the same jury did not appear, "therefore other persons then present being chosen for "this purpose are appointed a-new by the sheriff of the "county aforesaid, at the request of the aforesaid *Thomas* "*Turbervile*, and by the mandate of the aforesaid jus-"tices, whose names are affiled in the panel within writ-"ten, according to the form of the statute in such case "lately made and provided: And a jury being appointed "a-new, namely *John Warren*, *William Bussel*, and *Na-*"*thaniel Payne*, summoned in like manner, come, and to-"gether with the other jurors aforesaid first for this pur-"pose impanelled and sworn, being chosen, elected, tried, "and sworn to speak the truth touching the within con-"tents, upon their oath say, that the aforesaid *John Stampe* "is guilty of the within-written premises within laid to "his charge, as the said *Thomas Turbervile* thereupon

Postea and verdict.

Defendant's default.

[728]

Verdict for plaintiff.

"within complaineth against him, and assess the damages "of him the said *Thomas*, by the occasion within written, "besides his costs and charges by him concerning his suit "in this behalf applied, to eighty pounds, and for the said "costs and charges to forty shillings: Therefore it is con-"sidered, that the said *Thomas Tubervile* do recover "against the aforesaid *John Stampe* his said damages by "the said jury in form aforesaid assessed, and also eleven "pounds of his costs and charges for the increase, ad-"judged by the Court of the said lord the king now here "to the same *Thomas Tubervile* by his assent, which said "damages in the whole amount to thirty-one pounds; and "the said *John*, in mercy," &c.

Judgment.

Increase of damages.

Pleas before our Lord the King at Westminster, *of the Term of the* Holy Trinity *in the Tenth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 162.

ROBINS *against* ROBINS.

[3 Ld. Raym. Entries 446. S. C.]

Cornwal, to wit, "BE it remembered, That heretofore, to wit, "in the term of *Easter* last past, before our "lord the king at *Westminster*, came *Stephen Robins*, Gen-"tleman, by *Edward Hoblyn* his attorney, and brought "into the court of the said lord the king then there his "certain bill against *John Robins*, Gentleman, in the cus-"tody of the marshal, &c., of a plea of debt; and there "are pledges of prosecuting, that is to say, *John Doe* and "*Richard Roe*; which said bill followeth in these words, "to wit, *Cornwal*, to wit, *Stephen Robins*, Gentleman, com-"plains of *John Robins*, Gentleman, in the custody of the "marshal of the *Marshalsea* of our lord the king, before "the King himself being, for that, to wit, That whereas "the said *John* never had any lawful cause of action "against the same *Stephen*, so that by the law of this realm "of *England* the body of the said *Stephen* ought for the "same to be taken, and in prison detained until the said "*Stephen* should find sufficient bail to answer the said "*John* in the same cause: Nevertheless the said *John* [729] "knowing the premises, but contriving and maliciously "intending him the said *Stephen* in this behalf illegally to

Salk. 15. Cases B. R. 273. S. C. Case for arresting a man by colour of process and holding him to bail, where none was required by law, after tendering a common appearance.

"burthen, oppress, and damnify, and to injure and lessen "his credit and reputation as much as in him was, he the "said *John*, on the twenty-eighth day of *May* in the ninth "year of the reign of our lord *William* the Third, now "King of *England*, *&c.*, at *Bodmyn* in the county afore-"said, caused the same *Stephen*, by pretence and colour "of a certain process in the law, to be arrested; and al-"though he the aforesaid *Stephen* was always ready to ap-"pear upon such process at the day of the return thereof "to answer the said *John* according to the exigency of the "same process; yet the said *John* maliciously procured and "caused the same *Stephen*, on the day and year aforesaid, "at *Bodmyn* aforesaid, to be imprisoned, and there in "prison to be detained by the space of six months, for that "only that the aforesaid *Stephen* could not find sufficient "bail to answer the said *John* upon the said process; by "which the said *Stephen* was forced to expend great sums "of money for his sustenance in prison aforesaid; and the "necessary business of the said *Stephen* for that time re-"mained undone, and the same *Stephen* in his manner of "living was greatly injured, to the great disturbance of "his mind, and the manifest detriment of his fame and "credit: Wherefore the said *Stephen* saith that he is in-"jured and hath damage to the value of one hundred and "fifty pounds: And therefore he brings suit, *&c.*

Not guilty pleaded.

"And now at this day, to wit, *Friday* next after the "morrow of the *Holy Trinity* in this same term, until which "day the said *Stephen* had leave of imparling to the afore-"said bill, and then to answer, *&c.* before the lord the king "at *Westminster*, cometh as well the aforesaid *Stephen* by "his said attorney, as the aforesaid *John* by *Joseph Sher-"wood* his attorney; and the said *John* defends the force "and injury, when, *&c.*, and saith that he is not thereof "guilty; and of this he puts himself upon the country; and "the said *Stephen* thereupon likewise, *&c.* Therefore let "a jury come thereupon before the lord the king at *West-"minster*, on *Wednesday* next after three weeks from the "day of the *Holy Trinity*, and who neither, *&c.* to recog-"nize, *&c.*, because as well, *&c.* The same day is given to "the said parties there," *&c.*

Pleas before our Lord the King at Westminster, *of the Term of* St. Hilary *in the Ninth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 437.

IVESON *against* MOORE AND OTHERS.

[3 Ld. Raym. Entries 436. S. C.]

Yorkshire, to wit, "BE it remembered that heretofore, to wit, "in the term of *St. Michael* last past, before the lord the king at *Westminster*, came *Henry Iveson* and *Edward Barker* his attorney, and brought into "the court of our said lord the king then there his certain "bill against *John Moore*, Esq. and *Ruth* his wife, *Samuel* "*Wright*, *Jeremiah Lobley*, *Henry Smith*, and *Peter Blakey*, in the custody of the marshal, *&c.*, of a plea of "trespass upon the case; and there are pledges of prosecuting, namely, *John Doe* and *Richard Roe;* which said "bill followeth in these words, that is to say, *Yorkshire*, "to wit, *Henry Iveson* complains of *John Moore*, Esq. and "*Ruth* his wife, *Samuel Wright*, *Jeremiah Lobley*, *Henry* "*Smith*, and *Peter Blakey*, in the custody of the marshal "of the *Marshalsea* of our lord the king, before the king "himself being, for that, to wit, that whereas the said "*Henry Iveson*, on the fourteenth day of *May* in the ninth "year of the reign of our lord *William* the Third, now "King of *England*, *&c.*, and long before and always afterwards, until this time, was possessed and still is possessed, for a certain term of years then and yet to come "and unexpired, of and in a certain colliery and mine of "coals, being under the ground and land, and in the "bowels of a certain close or land, situate and lying in the "parish of *Whitkirke*, otherwise *Whitchurch*, in the county "aforesaid, called *Whitkirke*, otherwise *Whitchurch-fields*, "and near adjacent to the king's common highway in the "parish aforesaid, leading on the north part from the village of *Wetherby* in the county aforesaid, in, by, and "over a certain moor there called *Winmore*, and from "thence in, by, and through a certain lane there called "*Anlishaw Lane*, and from thence in, by, and through the "village of *Whitkirke*, otherwise *Whitchurch* aforesaid, "and so back again, and also of and in a certain other "colliery and mine of coals being under the ground and "land, and in the bowels of a certain close of moor or "parcel of land, in the parish aforesaid, called *Halton*

Salk. 15. Comb. 480. Carth. 451. Cases B. R. 262. Holt 10. S. C.

Declaration, setting forth, that he was possessed of a certain term of years in a colliery adjoining to the highway.

"*Moor*, situate and lying, and likewise near adjacent to "the king's common highway aforesaid, leading on the "north part from the village of *Wetherby* aforesaid, in, "by, and over the said *Winmore* moor, and from thence in,
[731] "by, and through the lane aforesaid, called *Anlishaw Lane*, "and from thence in, by, and through the village of *Halton* "in the county aforesaid, and so back again, in, by, and "through which said lane called *Anlishaw Lane*, the coals "got and dug out of the mine aforesaid were wont and in-"tended to be carried and conveyed, as matters fell out, "from the closes aforesaid, to the places neighbouring and "adjacent: And whereas also on the same fourteenth day of "*May*, the aforesaid *Henry Iveson* had a great quantity, to "wit, two hundred cart-loads of coals dug out of the mine "aforesaid, severally ready to be exposed to sale in the clo-"ses aforesaid, they the said *John*, *Ruth*, *Samuel*, *Jeremiah*, "*Henry Smith*, and *Peter*, being not ignorant of the premi-"ses, but contriving and fraudulently and maliciously in-"tending to hinder, deceive, and defraud the same *Henry* "*Iveson* of the use and benefit of his coals aforesaid, and to "alienate and seduce the buyers of the coals dug out of the "colliery aforesaid from the said colliery, and to appropriate "and procure them to the colliery of the said *John Moore* "near adjacent in the parish aforesaid, afterwards, to wit, "the aforesaid fourteenth day of *May* in the ninth year of "the reign of our said lord the now king abovesaid, did "lay and place four cart-loads of great stones, and one root "of a great ash in the said way in the lane aforesaid, at "the parish aforesaid, and continued and permitted the "stones and root of the ash aforesaid there to remain for "the space of one month, by which said stones, and the "root of the ash aforesaid, the aforesaid way, in, by and "through the lane aforesaid, was so much stopped up and "obstructed, that the carts and carriages for the carrying "and conveying of the coals gotten and dug out of the "colliery and mine aforesaid, could not pass in, by, and "through the said way, by the lane aforesaid; by which "the same *Henry Iveson* totally lost the benefit, profit, and "advantage of his said colliery for the whole time afore-"said; and the coals gotten from the colliery aforesaid, "for want of buyers, so hindered and obstructed for the "reasons aforesaid, became greatly damaged and depre-"ciated, to the damage of the said *Henry* of fifty pounds: "And therefore he brings suit, &c.

And had great quantities of coals ready dug for sale.

But the defendants maliciously intending to hinder buyers, did stop up the way.

Whereby the plaintiff lost the sale of his coals.

Imparlance.

"And now at this day, to wit, *Monday* next after eight "days from the day of *St. Hilary* in this same term, until "which day the aforesaid *John Moore* and *Ruth* his wife, "*Samuel*, *Jeremiah*, *Henry Smith*, and *Peter*, had leave of

"imparling to the said bill, and then to answer, &c. be-"fore the lord the king at *Westminster*, comes as well the "said *Henry Iveson* by his said attorney, as the aforesaid "*John Moore* and *Ruth* his wife, *Samuel*, *Jeremiah*, *Henry* "*Smith*, and *Peter*, by *Michael Johnson* their attorney: And "the same *John Moore* and *Ruth*, *Samuel*, *Jeremiah*, *Henry* "*Smith*, and *Peter*, defend the force and injury, when, &c. and "say that they are not guilty of the premises above laid to "their charge in manner and form as the aforesaid *Henry* "*Iveson* above complains against them: And of this they "put themselves upon the country: and the aforesaid *Hen-*"*ry Iveson* likewise, &c. Therefore let a jury come there-"upon before the lord the king at *Westminster* on *Saturday* "next after the morrow of the Purification of the Blessed "Virgin *Mary*; and who neither, &c. to recognize, &c. be-"cause as well, &c. The same day is given to the said "parties there," &c.

Not guilty pleaded.

[732]

Pleas before the Lord the King at Westminster, *of the Term of* St. Michael *in the Tenth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 125.

BUTCHER *against* ANDREWS.

Salk. 23. Carth. 446. Comb. 473. 3 Salk. 15. Holt 606. S. C.

Essex, to wit, "BE it remembered, that heretofore, to wit, "in the term of *Easter* last past, before the lord "the king at *Westminster*, came *Thomas Butcher* by "*Ralph Cole* his attorney, and brought into the court of "the said lord the king then there his certain bill against "*James Andrews*, in custody of the marshal of the *Marshal-*"*sea*, &c. of a plea of trespass upon the case; and there "are pledges of prosecuting, namely, *John Doe* and "*Richard Roe*; which said bill followeth in these words, "that is to say, *Essex*, to wit, *Thomas Butcher* complains "of *James Andrews* in the custody of the marshal of the "*Marshalsea* of our lord the king, before the king being, "for that to wit, That whereas the aforesaid *James* on the "first day of *August* in the eighth year of the reign of "our lord *William* the Third, now king of *England*, &c. "at *Gestingthorpe* in the county aforesaid, in consideration "that the same *Thomas Butcher*, at the special instance "and request of him the said *James*, would lend and ac-"commodate to one *George Andrews*, son of the said

Declares in consideration he would lend the defendant's son a sum not exceeding 5l. or trust him for goods of that value, he would pay.

"*James Andrews*, any sum or sums of money, and would "sell and deliver to the same *George* such goods, wares, "and merchandize, as he the same *George* should want and "require, and would trust the said *George* for the same, "so that the said sums of money so as aforesaid to be lent, "and the value of the said goods, wares, and merchandizes "to the said *George Andrews* by the aforesaid *Thomas* "*Butcher* to be delivered and sold, should not in the whole [733] "exceed the sum of five pounds of lawful money of *England*, "took upon himself, and then and there faithfully prom-"ised the same *Thomas Butcher*, that he the aforesaid "*James* would well and truly pay and satisfy to the said "*Thomas Butcher* not only all such sums of money so to be "lent and accommodated by him the said *Thomas Butcher* "to the said *George Andrews*, but also all such sums of mo-"ney as the goods, wares and merchandizes aforesaid at "the time of the sale and delivery thereof should be rea-"sonably worth, when he afterwards should be requested:

Averment.

"And the said *Thomas Butcher* in fact saith, that he the "same *Thomas Butcher* afterwards, to wit, on the same first "day of *August* in the eighth year abovesaid, at *Gesting-*"*thorpe* aforesaid, in the county aforesaid, at the said spe-"cial instance of him the said *James*, did lend and accom-"modate to the said *George Andrews* the sum of thirty shil-"lings of lawful money of *England*, and on the same day, "year, and place last abovesaid, at the aforesaid special "instance and request of him the said *James*, sold and de-"livered to the same *George Andrews* divers goods, wares, "and merchandizes, and trusted the aforesaid *George* for the "same; and that the goods, wares, and merchandizes afore-"said, at the time of the selling and delivery thereof, were "reasonably worth the sum of three pounds and ten shil-"lings of like lawful money of *England*, to wit, at *Gesting-*"*thorpe* aforesaid, in the county aforesaid, whereof the "said *James* afterwards, that is to say, on the same first day "of *August* in the year abovesaid, at *Gestingthorpe* aforesaid, "in the county aforesaid, then and there had notice by "the same *Thomas Butcher*:

Indeb. assumpsit for 5l. lent the son at the plaintiff's request.

And whereas also the said "*James* afterwards, to wit, on the same first day of *August* "in the eighth year abovesaid, at *Gestingthorpe* aforesaid, "in the county aforesaid, was indebted to the same *Tho-*"*mas Butcher* in five pounds of like lawful money of *Eng-*"*land*, for such sum of money of him the said *Thomas*

Indebitatus assumpsit for other 5l. laid out, &c.

"*Butcher*, by the aforesaid *Thomas Butcher*, at the like "special instance and request of him the said *James*, "to the same *George Andrews* before that time lent and "accommodated; and also was indebted to the same "*Thomas Butcher* in other five pounds of like lawful mo-

" ney of *England*, for divers goods, wares, and merchan-
" dizes by the said *Thomas Butcher* to the aforesaid *George*
" *Andrews*, at the like special instance and request of the
" same *James*, before that time sold and delivered; and the
" said *James* being so indebted to the said *Thomas Butcher*,
" he the said *James*, in consideration thereof, afterwards, to
" wit, on the same first day of *August* in the eighth year
" aforesaid, at *Gestingthorpe* aforesaid, in the county afore-
" said, took upon himself, and then and there in like man-
" ner lawfully promised that he the said *James* would well
" and faithfully pay and satisfy the aforesaid several sums
" of five pounds, and five pounds last mentioned, to the
" same *Thomas Butcher*, when afterwards he should be
" thereunto requested. And whereas also the said *James*
" afterwards, to wit, on the same first day of *August* in the
" eighth year above said, at *Gestingthorpe* aforesaid, in the [734]
" county aforesaid, was indebted to the same *Thomas*
" *Butcher* in other five pounds of like lawful money of *En-*
" *gland*, for so much money of him the said *Thomas Butcher*,
" by the same *Thomas Butcher*, at the like special instance
" and request of the said *James*, for the same *James* before
" that time expended and laid out; and he the said *James*
" being thereupon so indebted to the same *Thomas Butcher*,
" he the said *James*, in consideration thereof, afterwards,
" to wit, the same day and year last above said, at *Gest-*
" *ingthorpe* aforesaid, in the county aforesaid, did take
" upon himself, and then and there in the like manner did
" faithfully promise the said *Thomas Butcher*, that he the
" said *James* would well and truly pay and satisfy the
" aforesaid five pounds last mentioned to the same *Thomas*
" *Butcher*, when he should be afterwards thereunto re-
" quested. Nevertheless the aforesaid *James* in nowise **Breach.**
" regarding his several promises and undertakings afore-
" said in form aforesaid made, but contriving and fraudu-
" lently intending craftily and subtilly to deceive and de-
" fraud the said *Thomas Butcher*, hath not yet paid the
" aforesaid several sums of money, or any part thereof, to
" the said *Thomas Butcher*, nor hath hitherto in anywise
" contented him for the same, (although to do this the
" same *James* afterwards, to wit, on the second day of
" *August* in the eighth year abovesaid, at *Gestingthorpe*
" aforesaid, in the county aforesaid, was requested by the
" same *Thomas Butcher*,) but hath hitherto altogether re-
" fused and still doth refuse to pay them to him, or any
" ways to content him for the same, to the damage of him
" the said *Thomas Butcher* of thirty pounds: And therefore
" he brings suit, *&c.*

" And now at this day, to wit, *Monday* next after three
" weeks from the day of *St. Michael* in this same term.

"until which day the aforesaid *James* had leave to imparle to the aforesaid bill, and then to answer, *&c.* before our lord the king at *Westminster* comes as well the aforesaid *Thomas* by his said attorney, as the aforesaid *James* by *John Clarke* his attorney: And the same *James* defends the force and injury, *&c.* and saith that he did not take upon himself in manner and form as the aforesaid *Thomas* above complains against him: And of this he puts himself upon the country; and the aforesaid *Thomas* in like manner, *&c.* Therefore let a jury come thereupon before the lord the king at *Westminster*, on —— next after —— and who neither, *&c.* to recognize, *&c.* because as well, *&c.* The same day is given to the parties aforesaid there," *&c.*

Non assumpsit pleaded.

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[735]

Pleas before our Lady the Queen at Westminster, *of the Term of* St. Hilary *in the First Year of the Reign of our Lady* Anne, *now Queen of* England. *&c. Roll* 435.

COGGS *against* BERNARD.

[3 Ld. Raym. Entries 240. S. C.]

Salk. 26. 3 Salk. 11, 268. Holt 13, 131, 528. S. C.

Declaration upon defendant's promise to take hogsheads of brandy out of one cellar and safely put them in another; for negligence.

Middlesex, "BE it remembered, That heretofore, to wit, to wit, "in the term of *St. Michael* last past, before our lady the queen at *Westminster*, came *John Coggs* by *Joseph Sherwood* his attorney, and brought into the court of our said lady the queen then there his certain bill against *William Bernard*, in the custody of the marshal, *&c.* of a plea of trespass upon the case; and there are pledges of prosecuting, that is to say, *John Doe* and *Richard Roe;* which said bill followeth in these words, that is to say, *Middlesex*, to wit, *John Coggs* complains of *William Bernard*, in the custody of the marshal of the *Marshalsea* of our lady the queen, before the queen herself being, for that, to wit, That whereas the aforesaid *William*, on the 10th day of *November* in the thirteenth year of the reign of our lord *William* the Third, late king of *England*, *&c.* at the parish of *St. Clement Danes* in the county of *Middlesex* aforesaid, had undertaken safely and securely to take up divers casks of brandy of the said *John*, then being in a certain cellar situate in a certain place called *Brooks-*

" *Market* in the parish of *St. Andrew Holborn* in the county
" aforesaid; and had undertaken to put the same safely
" and securely in a certain other cellar situate in a certain
" other place called *Water-street*, in the parish of *St. Clement*
" *Danes* in the county aforesaid, the same *William* his ser-
" vants and agents afterwards, to wit, the same day and
" year, at the parish of *Saint Clement Danes* aforesaid,
" handled the casks of brandy aforesaid so negligently and
" improvidently in putting them in the cellar last men-
" tioned, that for want of good care of the said *William*, his
" servants and agents, one of the said casks of brandy then
" and there was broken, and a great quantity, to wit,
" one hundred and fifty bottles of the brandy aforesaid in
" the same cask, was by that occasion poured out upon the
" ground and spoiled. And whereas also the aforesaid
" *William*, afterwards, to wit, on the same tenth day of *No-*
" *vember* in the thirteenth year abovesaid, at *St. Clement*
" *Danes* aforesaid in the county of *Middlesex* aforesaid, had
" undertaken safely and securely to take up divers other
" casks of brandy of the said *John*, then being in a certain
" other cellar situate in a certain place called *Brooks-*
" *Market* in the parish of *St. Andrew Holborn*, in the county [736
" aforesaid, and to place those casks there on a carr to be
" carried to a certain other cellar situate in a certain other
" place called *Water-street* in the parish of *St. Clement*
" *Danes* in the county aforesaid, and the said casks so as
" aforesaid, carried to the last-mentioned cellar situate in
" *Water-street* aforesaid, from the said carr safely and se-
" curely there to let down, and place in the cellar last
" mentioned; the same *William*, his servants and agents
" afterwards, to wit, the same day and year abovesaid,
" at the parish of *St. Clement Danes* aforesaid in the
" county aforesaid, so negligently and improvidently han-
" dled the said casks of brandy last mentioned in laying
" them in the cellar last mentioned, that for want of due
" care of the said *William*, his servants and agents, one of
" the same casks of brandy last mentioned was then and
" there broken, and a great quantity, to wit, one hundred
" and fifty bottles of the brandy last mentioned being in
" the same cask last abovesaid, was by that occasion then
" and there spilt upon the ground and destroyed: Where-
" fore the said *John* saith, that he is injured and hath
" damage to the value of one hundred pounds. And there-
" fore he brings suit, &c.

" And now at this day, to wit, *Saturday* next after eight
" days from the day of *Saint Hilary* in this same term, un-
" til which day the said *William Bernard* had leave of im-
" parling to the said bill, and then to answer, &c. before

"our lady the queen at *Westminster*, comes as well the "aforesaid *John Coggs* by his said attorney, as the said "*William Bernard* by *William Collier* his attorney; and the "same *William Bernard* defends the force and injury, when,

Not guilty.

"*&c.*, and saith that he is not guilty thereof; and of this "he putteth himself upon the country; and the before-"said *John Coggs* in like manner, *&c.* Therefore let a jury

Venire awarded.

"thereupon come before our lady the queen at *Westmin-*"*ster*, on *Monday* next after the morrow of the Purification "of the Blessed *Mary*, and who neither, *&c.* to recognize, "*&c.*, because as well, *&c.* The same day is given to the "parties aforesaid there, *&c.*

Postea continued.

"Afterwards process thereon is continued between the "parties aforesaid of the plea aforesaid by the jury re-"spited thereupon between them before our lady the "queen at *Westminster*, until *Thursday* next after the mor-"row of the Purification of the Blessed *Mary* then next "following, unless the trusty and well beloved of our lady "the queen, Sir *John Holt*, Knt. Chief Justice of our lady "the queen appointed to hold pleas in the court of our "said lady the queen, before the queen herself, come "before on *Wednesday* next after eight days from the day "of the Purification of the Blessed *Mary* at *Westminster* "aforesaid in the county of *Middlesex* aforesaid, in the "great hall of pleas there, according to the form of the "statute, *&c.*, for want of jurors, *&c.*

"At which day before our lady the queen at *West-*"*minster* comes the aforesaid *John Coggs* by his said at-

[737]

"torney, and the aforesaid Chief Justice of our lady the

Postea returned.

"queen, before whom, *&c.* sent here his record before "him had in these words, Afterwards, at the day and "place within contained before *John Holt*, Knt., Chief "Justice within written, have associated to himself *John* "*Ince*, gent. by form of the statute, *&c.*, comes as well "the within named *John Coggs* as the within named *Wil-*"*liam Bernard*, by their attornies within mentioned: And "the jurors of that jury being summoned likewise come, "who being chosen, tried, and sworn to speak the truth "of the within contents, upon their oath say, that the "aforesaid *William Bernard* is guilty of the premises "within laid to his charge, in manner and form as the "aforesaid *John Coggs* within thereupon complaineth "against him, and assess the damages of him the said "*John Coggs*, by occasion thereof, besides his costs and "charges by him applied about his suit in this behalf, to "ten pounds, and for those costs and charges to twenty

Judgment for the plaintiff.

"shillings: Therefore it is considered, that the said *John* "*Coggs* do recover against the aforesaid *William Bernard* "the damages aforesaid by the said jury in form aforesaid

"assessed, and also twenty and one pounds adjudged by "the Court of the said lady the queen now here, to the "same *John Coggs* for his costs and charges aforesaid, by "his assent, of increase, which said damages in the whole "amount to thirty-two pounds; and the said *William Bernard* in mercy," &c.

Pleas before the Lord the King at Westminster, *of the Term of the* Holy Trinity *in the Ninth Year of the Reign of* William *the Third, now King of* England, *&c.*

HARRISON *against* CAGE.

[3 Ld. Raym. Entries 403. S. C.]

Cambridgeshire, to wit, "BE it remembered, That heretofore, "to wit, in the term of *Easter* in the "ninth year of the reign of our lord *William* the Third, "now King of *England*, &c., before the lord the king at "*Westminster* came *Henry Harrison* gentleman, by *Michael Johnson* his attorney, and brought into the court of "the said lord the king then there his certain bill against "*Adlard Cage* gentleman, and *Elizabeth* his wife, in the "custody of the marshal, &c., of a plea of trespass upon "the case; and there are pledges of prosecuting, to wit, "*John Doe and *Richard Roe;* which said bill followeth in "these words, that is to say, *Cambridgeshire*, to wit, *Henry* "*Harrison* gentleman complains of *Adlard Cage* gentle- "man and *Elizabeth* his wife, in the custody of the mar- "shal of the *Marshalsea* of the lord the king, before the "king himself being, for that, to wit, That whereas the "aforesaid *Elizabeth*, whilst she was sole, to wit, on the "first day of *April* in the eighth year of the reign of our "lord *William* the Third, now King of *England*, &c., at "*Borough-Green* in the county aforesaid, (in consideration "that the same *Henry* then and still being a bachelor and "not married, at the special instance and request of the "said *Elizabeth*, then and there had agreed with the same "*Elizabeth*, and had taken upon himself and faithfully "promised the same *Elizabeth*, that he the same *Henry* "would marry the said *Elizabeth*,) took upon herself and "then and there faithfully promised that she the said *Elizabeth* would marry him the said *Henry;* and although

5 Mod. 411. Salk. 24. Carth. 407. Cases B. R. 214. Holt 456. S. C.

Case against husband and wife upon promise of marriage by her when sole.

[* 738]

"the said *Henry*, giving credit to the promise and assumption of the said *Elizabeth*, altogether refused to contract matrimony with any other woman, and yet continueth a bachelor and unmarried, and always from the time of making the promise and assumption aforesaid (whilst the said *Elizabeth* was single) was ready and often offered legally to marry the same *Elizabeth*, to wit, at *Borough-*

Breach.

"*Green* aforesaid, in the county aforesaid; nevertheless the said *Elizabeth*, whilst she was sole, not regarding her promise and assumption aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *Henry* in this behalf, hath not married him the said *Henry*, (although so to do the aforesaid *Elizabeth* after her promise and assumption aforesaid made,

Request and refusal.

"to wit, on the twenty-ninth day of *April* in the eighth year abovesaid, and often before and afterwards, at *Borough-Green* aforesaid, in the county aforesaid, was by the said *Henry* required,)but altogether refused to marry him, and afterwards, to wit, on the first day of *October* in the

And marrying the defendant.

"eighth year aforesaid, at *Borough-Green* aforesaid, in the county aforesaid, married the aforesaid *Aldard* contrary to the aforesaid promise and assumption of the same *Elizabeth*: And whereas also the aforesaid *Elizabeth*, whilst she was sole, to wit, on the first day of *May* in the eighth year abovesaid, was indebted to the same *Henry* in three hundred pounds of lawful money of *England*, for money by him the said *Henry*, at the special instance and request of the said *Elizabeth* and for the same *Elizabeth*

Indebit. assump. for money laid out for and lent to her when sole.

"(while she was sole) before that time paid and laid out, and for money by the same *Elizabeth*, while she was sole, before that time borrowed and received of the said *Henry*, and being so indebted thereupon, the said *Elizabeth* (while she was sole) on the same day and year last mentioned at *Borough-Green* aforesaid, in the county aforesaid, in consideration thereof undertook and then and there faithfully promised the said *Henry*, that she the said *Elizabeth* would well and faithfully pay and satisfy to the said *Henry* the same three hundred pounds: Nevertheless

[739]

"the same *Elizabeth* (while she was sole,) and the aforesaid *Adlard* and *Elizabeth*, after the marriage between them celebrated, not regarding the promise and undertaking of the said *Elizabeth* last mentioned in form aforesaid made, but contriving and fraudulently intending the same *Henry* in this behalf craftily and subtilly to deceive and defraud, the before said three hundred pounds have not paid, nor hath either of them paid any part thereof to the said *Henry*, (although often requested,) but have altogether refused and yet do refuse to pay the same to

" him, or anywise to content him for the same: Where- " fore the said *Henry* saith that he is injured and hath da- " mage to the value of three thousand pounds: And there- " upon he brings suit, *&c.*

" And now at this day, to wit, *Wednesday* next after the " morrow of the *Holy Trinity* in this same term, until which " day the aforesaid *Adlard* and *Elizabeth* had leave to im- " parle to the said bill, and then to answer, *&c.* before the " lord the king at *Westminster* comes as well the said *Hen-* " *ry* by his attorney aforesaid, as the aforesaid *Adlard* and " *Elizabeth* by *Richard Edwards* their attorney: And the " same *Adlard* and *Elizabeth* defend the force and injury, " when, *&c.*, and say that the aforesaid *Elizabeth* did not " take upon herself in manner and form as the aforesaid " *Henry* above complains against them; and of this they " put themselves upon the country; and the said *Henry* in " like manner, *&c.* Therefore let a jury come thereupon " before the lord the king at *Westminster*, on *Wednesday* " next after three weeks from the day of the *Holy Trinity:* " and who neither, *&c.* to recognise, *&c.* because as well, " *&c.* The same day is given to the aforesaid parties there, " *&c.* Afterwards the proceedings thereon are continued " between the aforesaid parties of the plea aforesaid by the " jury respited thereupon between them, before the lord " the king at *Westminster*, until *Monday* next after three " weeks from the day of *St. Michael* from thence next fol- " lowing, unless the justices of the lord the king appointed " to take assizes in the county aforesaid, do first come on " *Thursday* the eleventh day of *August* at the castle of *Cam-* " *bridge* in the county aforesaid, by form of the statute, *&c.* " for want of jurors, *&c.* At which day, before the lord " the king at *Westminster*, comes the said *Henry* by his said " attorney, and the beforesaid justices before whom, *&c.*, " have sent here their record had before them in these " words, to wit, afterwards at the day and place within " contained, before Sir *Edward Ward*, Knt., Chief Baron " of the Exchequer of our lord the king, and *Thoms Knight* " Esq., for this turn associate to the said Sir *Edward Ward*, " and Sir *Thomas Rokeby*, Knt., one of the justices of the " said lord the king appointed to hold pleas before the king " himself, the justices of our said lord the king appointed " to take assizes in the county of *Cambridge* by form of " the statute *&c.*, the presence of the said *Thomas Roke-* " *by* not being expected, by virtue of the writ of the " said lord the king of *si non omnes*, cometh the within- [740] " named *Henry Harrison* by his attorney within mention- " ed, and the within written *Aldard Cage* and *Elizabeth* " his wife, although solemnly required, do not come, but

Postea continued.

Postea returned.

"have made default: Therefore let the jury whereof "mention is within made be taken against them by default; "upon which the jurors of that jury being likewise summoned come, who being chosen, tried, and sworn to speak "the truth of the within contents, upon their oath say, "that the aforesaid *Elizabeth* did take upon herself in "manner and form as the aforesaid *Henry* within complains against the said *Aldard* and *Elizabeth* and assets "the damages of the same *Henry* by occasion of the non-"performance of the promises and undertakings within "specified, besides his costs and charges by him about his "suit in this behalf applied, to four hundred pounds, and "for those costs and charges to forty shillings: Therefore "it is considered, that the aforesaid *Henry Harrison* do re-"cover against the aforesaid *Aldard Cage* and *Elizabeth* "his wife his aforesaid damages by the jury aforesaid in "form aforesaid assessed, and also sixteen pounds for his "costs and charges aforesaid, adjudged by the Court of our "said lord the king now here to the said *Henry* by his as-"sent, of increase, which damages in the whole amount to "four hundred and eighteen pounds; and the aforesaid "*Aldard* and *Elizabeth* in mercy, *&c.*

Defendants default.

Verdict for the plaintiff.

Judgment.

"Afterwards, to wit, on *Saturday* the twenty-sixth day "of *November*, in the tenth year of the reign of our lord "*William* the Third, now king of *England*, *&c.* tran-"scripts of the record and proceedings aforesaid between "the parties aforesaid of the plea aforesaid, with all "things thereunto belonging, by pretence of a certain "writ of the said lord the king, of correcting errors pro-"secuted by the aforesaid *Aldard* and *Elizabeth* in the "premises before the justices of the said lord the king of "the Common Pleas, and the Barons of the Exchequer "of the said lord the king of the degree of the coif in "the chamber of the Exchequer aforesaid, according to "the form of the statute made in the parliament of our "lady *Elizabeth*, late queen of *England*, *&c.* held at "*Westminster* on the twenty-third day of *November* in the "twenty-seventh year of her reign, were transmitted "from the aforesaid court of the said lord the king here, "before the king himself; and the aforesaid *Adlard* and "*Elizabeth* appearing in the same court of Exchequer-"chamber, assigned certain matters for error to be had "on the record and process aforesaid, for revoking and "making void the judgment aforesaid, to which the afore-"said *Henry* likewise appearing in the same court of Ex-"chequer-chamber aforesaid hath pleaded that there was "nothing in anywise erroneous, either in the record and "proceedings aforesaid, or in the giving of the judgment "aforesaid, and afterwards, to wit, on *Tuesday* the twen-

A writ of error in the Exchequer chamber.

Error assigned.

"ty-seventh day of *June* in the eleventh year of the reign "of our lord *William* the Third, now king of *England*, *&c.* "as well the record and proceedings aforesaid, and the "judgment given upon the same, as the aforesaid causes "by the said *Adlard* and *Elizabeth* assigned and alleged "for error, being seen, and by the Court of Exchequer-"chamber aforesaid diligently examined and more fully "understood; it seemed to the same Court of Exchequer-"chamber aforesaid, that the said record is in nowise "faulty or defective, and that the said record was not any-"wise erroneous: Therefore it was then and there by the "same Court of Exchequer-chamber aforesaid considered, "That the judgment aforesaid should in all respects be "affirmed and stand in all its force and effect, the said "causes and matters by the aforesaid *Adlard* and *Elizabeth* "assigned and alleged for error in anywise notwithstand-"ing; and it was further then and there by the same court "considered, that the aforesaid *Henry* should recover "against the said *Adlard* and *Elizabeth*, ten pounds and "ten shillings, adjudged by the Court there to the said "*Henry* by his assent, according to the form of the statute "for that purpose made and provided, for his damages, "costs, and charges, which he had by occasion of the "delay of execution of the judgment aforesaid, by pre-"tence of the prosecution of the said writ of error; and "thereupon the aforesaid record, and also the proceed-"ings of the said justices of the Common Pleas afore-"said, and the said barons of the Exchequer afore-"said, had before them in the premises before the lord "the king, wheresoever, *&c.* were then by the same jus-"tices and barons sent back according to the form of the "statute, *&c.* and do now remain in the Court of the lord "the king here before the king himself, *&c.* Afterwards, "to wit, on *Wednesday* next after three weeks from the "day of the *Holy Trinity* in the thirteenth year of the "reign of our lord *William* the Third, now king of *En-gland*, *&c.* before the said lord the king at *Westminster* "cometh the aforesaid *Henry Harrison* by his said attor-"ney, and acknowledgeth himself to be satisfied by the "aforesaid *Adlard* and *Elizabeth*, concerning the debt, "damages, costs, and charges aforesaid: Therefore let the "same *Adlard* and *Elizabeth* be thereupon acquitted of "the said debt, damages, costs, and charges," *&c.*

[741]

Judgment affirmed.

Costs adjudged, occasioned by the delay of execution and remittance of the record.

Satisfaction acknowledged.

Pleas before our Lady the Queen at Westminster, *of the Term of* St. Michael *in the First Year of the Reign of our Lady* Anne, *now Queen of* England, *&c.* *Roll* 223.

JUSTIN *against* BALLIN.

Salk. 34. S. C.

England, " BE it remembered, that on *Friday* next after to wit, " three weeks from the day of *St. Michael* in " this same term, before the lady the queen at *Westminster*, comes *Nicholas Justin* in his proper person, and " causes the court of the said lady the queen now here " to understand and be informed, That whereas in the " statute made in the parliament of our lord *Richard* " the Second, late king of *England* after the Conquest, " held in the thirteenth year of his reign at *Westminster* " in the county of *Middlesex*, it is amongst other things " ordained and enacted by the authority of the same " parliament, that admirals and their deputies from " thence afterwards should in no sort intermeddle con- " cerning any thing done within the kingdom of *England*, " save only concerning a thing done upon the sea, as was " of right accustomed in the time of our lord *Edward* " late king of *England*, grandfather of the same lord the " king *Richard* the Second, as in the same statute amongst " other things is more fully contained: And whereas " also by another statute made in the parliament of the " aforesaid late king *Richard* the Second, in the fifteenth " year of his reign, held at *Westminster* aforesaid in the " said county of *Middlesex*, it is amongst other things de- " clared, ordained, and established, that the Court of Ad- " miralty should have no cognizance, power of jurisdic- " tion of all contracts, pleas, and complaints, and of all " other things done or arising within the bodies of coun- " ties, as well by land as by water, and also of the wreck " of the sea, but that all such contracts, pleas, and com- " plaints, and all other things arising within the bodies of " counties, as well by land as water, as aforesaid, and also " wreck of sea, should be determined, tried, discussed, and " remedied by the law of the land, and not before the " admiral or admirals, nor by his lieutenant in any man- " ner as in the same statute is also amongst other things " more fully contained: And whereas also in the parlia- " ment of our lord *Henry* the Fourth, late king of *England* after the Conquest, held in the second year of his " reign at *Westminster* in the county aforesaid, it is amongst

Suggestion, setting forth statute of 13 Rich. 2. whereby the Admiralty have no cognizance of any thing done upon the land.

Another statute (15 R. 2.) to the same purpose.

Another statute (2 H. 4.) confirming the former.

" other things ordained and enacted, that the aforesaid " statute of the aforesaid year of our said late King *Richard* the Second, should be held and kept and carried into " due execution as in the same statute amongst other " things is contained: And whereas also all and singular " pleas and affairs touching or concerning the validity, " explication, interpretation, construction, or exposition " of any statutes in all parliaments whatsoever of our said " lady the now queen, or her progenitors, late kings or " queens of *England*, enacted, made, and provided, and " all and singular pleas and conusance of pleas for any " trespasses, contracts, trespasses upon the case, for the " taking, detaining, or converting of any goods or chat- " tels, or for any other cause whatsoever, as well upon " land as upon water, within the body of any county " within this kingdom of *England*, or elsewhere upon " land, happening, arising, emerging, done, or brought " to any person or persons, do specially belong and apper- " tain to our lady the now queen and her royal crown, " and by the laws and statutes of this realm of *England* " ought, and from time past always hitherto were accus- " tomed to be tried, determined, and discussed in the " queen's temporal courts of record, before the lady the " queen now here, or before her temporal justices or " judges, and not before the lord admiral of *England*, nor " by the admiral of *England*, or his lieutenant or deputy " in any manner: Nevertheless one *John Ballam* and one " *William Hart* not being ignorant of the premises, but " contriving unjustly to burthen, oppress, and aggrieve " the said *Nicholas Justin*, contrary to due course of the " law of this kingdom of *England*, and contrary to the " form of the several statutes aforesaid, and to draw the " conusance of a plea which specially belongs and apper- " tains to our said lady the now queen and her royal " crown to another examination in the court of Admi- " ralty before the Right Honourable Sir *Charles Hedges*, " Knt. doctor of laws and supreme judge of the court of " Admiralty of *England*, or his deputy or surrogate, or " some other competent judge in that behalf, by virtue of " a certain process out of the said court of Admiralty, for " the prosecution of a ship called *The Swan of Norway*, " whereof *Berent Gertson* lately was, *John Orce*, other- " wise *Ord*, otherwise *Larwick*, is now master, and its " rigging and appurtenances; and the said *Nicholas Justin* " being owner of the said ship, for and concerning divers " wares and merchandizes, works and labours by the " aforesaid *J. Ballam* and *W. Hart* sold, delivered, done, " found, and provided for the said ship, out of the juris- " diction of that court, unjustly drew into plea, warily and

That the exposition of the statutes belongs to the courts temporal.

Breach.

By process out of the Admiralty for goods and labour.

" craftily libelling and suggesting against the said ship, and " the aforesaid *Nicholas Justin* in the same court of Admi- " ralty, amongst other things, as followeth, that is to say:

Libel set forth. " *First*, That in the month of *November* in the year of our " Lord one thousand seven hundred, and for several months " before and after, the said *Berent Gertson* of *Norway* was " the master and commander of the said ship the *Swan*, " and had the care and government of her as master, and " was put in and appointed master of her by her owner,

[744] " who was then an inhabitant of *Norway* and a subject of " the King of *Denmark*, but is since dead, and so much the " said *Berent Gertson* hath confessed and declared, and this " was and is true, public, and notorious, and alleges every " thing jointly and severally: *Also*, That in the said month " of *November*, in the year of our Lord one thousand seven " hundred, the said ship the *Swan* being upon the high and " open seas near the port of *London*, within the jurisdiction " of the High Court of the Admiralty of *England*, and " then standing in great need of a new cable, a coil of " small ratlin, a new anchor, and the other things men- " tioned in the two schedules hereunto annexed, the said " *John Ballam* and *William Hart* did thereupon, at the " special instance and request of the said *Berent Gertson*, " then master and commander of the said ship upon the " high and open seas, and within the jurisdiction afore- " said, furnish and supply the said ship with the cable, " anchor, and other things mentioned in the said two " schedules, at the respective rates schedulate, to wit, " the said *John Ballam* furnished and supplied her with " the cable, small ratlin, and the other things mentioned " in the first of the said schedules N° 1, and at the rates " there set down, amounting in all to the sum of one " hundred and four pounds fifteen shillings sterling, and " the said *William Hart* furnished and supplied her with " the anchor and the other things mentioned in the said " other schedule N° 2, and at the rates there set down, " amounting in the whole to the sum of nineteen pounds " eleven shillings and six-pence sterling, and the said " cable, anchor, and other things mentioned in the said " two schedules, were at the time and place aforesaid " sent and delivered by the said *John Ballam* and *Wil- " liam Hart*, or their order, on board the said ship, and " have ever since and now are belonging to her and ap- " plied to her use, and the same were, at the time of " their being sent and delivered on board the said ship, " really and truly worth the respective rates and sums " of money schedulate, and the like sort of goods were " then usually sold at the same rates; and this was and " is true, public, and notorious, and so much the said " *Berent Gertson* hath confessed and declared to several

persons, *but lays it of other good sums at the time and place,*
" &c., *and as above: Also,* That the said ship the *Swan,*
" shortly after the said cable, anchor, and the other things
" mentioned in the said two schedules, were sent and de-
" livered on board her as aforesaid, proceeded to *Norway,*
" and did then and ever, and now doth belong to that
" place, and the said *Berent Gertson* her late master, did,
" and do all reside in *Norway,* and were and are subjects
" to the King of *Denmark;* and this was and is true, pub-
" lic, and notorious, and so much the said *John Orce,*
" otherwise *Ord,* otherwise *Larwick,* hath lately confessed
" and declared to several persons, and *sets forth as above:*
" *Also,* That the said several sums of money mentioned in
" the said schedules, in all amounting in the whole to
" the sum of one hundred twenty-four pounds six shil-
" lings and sixpence sterling, are really and truly due to
" the said *John Ballam* and *William Hart,* for the said [745]
" cable, anchor, and the other things schedulate, and the
" said *John Orce,* otherwise *Ord,* otherwise *Larwick,* the
" present master of the said ship, hath lately confessed and
" declared to several persons, that the aforesaid sums of
" money are yet unpaid, and that it is so set down in in-
" structions given him by the said *Nicholas Justin* the
" owner of the said ship, or to that effect, *as before: Also,*
" That the said *John Ballam* and *William Hart* have se-
" veral times demanded the sums of money due to them
" as aforesaid, of the present master of the said ship, per-
" sonally, and of her said owner by letters, but they re-
" fusing or delaying to pay for the same, and the said *John*
" *Ballam* and *William Hart* having no remedy for the reco-
" very thereof, but by arresting the said ship in the High
" Court of Admiralty of *England,* have caused the same to
" be arrested by virtue of a warrant from the said Court,
" and all persons having or pretending to have any right,
" title, or interest therein, to be duly cited to appear in
" the said court to answer to them the said *John Bal-*
" *lam* and *William Hart,* in a cause or causes civil and ma-
" ritime; and the said *Nicholas Justin* has there appeared
" by his proctor, and submitted himself to the jurisdiction
" of the said court, and as the owner of the said ship given
" bail to answer the action brought by the said *John Bal-*
" *lam* and *William Hart* against the said ship, and to abide
" by the judgment of the said Court, and to pay what shall
" be adjudged, together with the expences of suit, and
" thereupon procured the said ship to be released from the
" said arrest, by the proceedings of the said Court, to which
" the party proponent refers himself, doth appear.

N° 1, *Delivered for the use of the ship* Swan *of* Long-sound, *Mr.* Berent Gertson, *Commander*, November *the* 16*th*, 1700, per John Ballam.

C.	q.	lb.		£.	s.	d.
59	1	10	A cable of 15, in full 120 fathom.			
0	1	3	A coil of small ratlin.			
59	2	13	at 35 *s.* *per* hundred is	104	6	8
			One hand-line, 4 skains of marlin and housen, — —	0	3	4
			Lighteridge on board, —	0	5	0
				104	15	0

[746] N° 2, *Smith's work to the ship* Swan, Berent Gertson, *Master*, November *the* 25*th*, 1700, *by* William Hart.

	£.	s.	d.
For one new anchor, weighing 13 *C.* 24 *lb.* *per* contract, —	19	0	4
For one hundred five-inch nails, —	0	4	2
For one hundred four-inch nails, —	0	2	6
For two hundred of nails, —	0	3	0
For mending one pump-iron, —	0	1	6
	19	11	6

Averment, That the goods and work were for the ship in the river of Thames.

" Also that all and singular the premises were and are " true and notorious, as by a true copy of the aforesaid " libel in the court of the said lady the queen, before the " queen herself now here had, read, and heard, amongst " other things more fully appears, when, in truth, the " wares and merchandizes, works, and labours aforesaid, " were found, provided, done, sold, and delivered for the " aforesaid ship in the river of *Thames*, to wit, in the pa- " rish of St. *Paul Shadwell*, in the county of *Middlesex*, " and not upon the high sea, nor within the jurisdiction " of the Court of Admiralty aforesaid, as by the libel " aforesaid is above supposed; to all and singular which " matters the same *John Ballam* and *William Hart* un- " justly constrained him the said *Nicholas Justin* to appear " in the said Court of Admiralty, before the aforesaid " judge of the same Court, concerning the premises, and " to answer the same *John Ballam* and *William Hart* of

" and concerning the same; and although the same *Ni-*
" *cholas Justin* in the said Court of Admiralty, before the
" aforesaid judge of that court, did plead and allege all and
" singular the premises by him above suggested and al-
" leged for his discharge and dismission from thence in
" this behalf, and offered to prove the same by inevitable
" testimony and truth; yet the same judge of that court
" hath altogether refused and still refuses to admit the said
" plea, allegation, and proof: And the beforesaid *John*
" *Ballam* and *William Hart* do, with all their power, en-
deavour and daily contrive to compel him the same *Ni-*
cholas Justin to answer of and concerning the premises
aforesaid, and to be condemned in the premises by the
sentence and final decree of the Court of Admiralty
aforesaid, in contempt of the said lady the now queen,
" in disherison of her crown and dignity, and to the da-
" mage, impoverishment, and manifest grievance of the
" same *Nicholas*, and against the law and custom of the
" realm of the said lady now queen of *England*, and also
" against the form and effect of the several statutes afore-
" said in such case in form aforesaid made and provided:
" And this the same *Nicholas Justin* is ready to verify:
" Wherefore the said *Nicholas*, humbly imploring the aid
" and bounty of the Court of the said lady the queen
" before the now queen herself, prays for himself a
" remedy, and a writ of prohibition of the said lady the
" queen here, to be directed to the said judge of the Court
" of Admiralty aforesaid, or to any other competent judge
" whatsoever in this behalf, to prohibit him or them that he
" or they hold not plea in any manner touching or concern-
" ing the premises aforesaid, before him or them, *&c.* And
" it is granted to him," *&c.*

Plea in the Admiralty.

[747]

Pleas before our Lord the King at Westminster, *of the Term of* Easter *in the Twelfth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 108.

HILLYARD *against* COX.

[3 Ld. Raym. Entries 468. S. C.]

Berkshire, to wit, " BE it remembered, That heretofore, to
" wit, in the term of St. *Michael* last past,
" before our lord the king at *Westminster*, came *Daniel*

Salk. 37.

"*Hillyard* clerk, administrator of all and singular the goods "and chattels, rights and credits, which were of *John Cox* "deceased, at the time of his decease, who died intestate, "by *Edward Chapman* his attorney, and brought into the "court of the said lord the king then there his certain bill "against *Thomas Cox* in the custody of the marshal, &c., "of a plea of trespass upon the case; and there are pledg- "es of prosecuting, namely, *John Doe* and *Richard Roe;* "which said bill is in these words, that is to say, *Berkshire,* "to wit, *Daniel Hillyard* clerk, administrator of all and "singular the goods and chattels, rights and credits, which "were of *John Cox* deceased, at the time of his death, who "died intestate, complains of *Thomas Cox* in the custody "of the marshal of the *Marshalsea* of the lord the king, be- "fore the king himself being, for that, to wit, That where- "as the aforesaid *Thomas,* on the first day of *March* in the "eleventh year of the reign of our lord *William* the Third, "now King of *England,* &c. at *Farringdon* in the county afore- "said, was indebted to the aforesaid *John* in his lifetime in "one hundred shillings of lawful money of *England,* for di- "vers goods, wares, and merchandizes of the same *John* by the "aforesaid *John* in his lifetime to the said *Thomas,* at the "special instance and request of the same *Thomas,* before "that time sold and delivered: And being so indebted the "aforesaid *Thomas* in consideration thereof afterwards, to "wit, the same day, year, and place abovesaid, undertook, "and then and there faithfully promised the said *John* in "his lifetime, that he the aforesaid *Thomas* would well and "truly pay and satisfy the said one hundred shillings to the "said *John,* when he should be thereunto afterwards request- "ed: And whereas also afterwards, to wit, on the second "day of *March,* in the eleventh year abovesaid, at *Farringdon* "aforesaid, in consideration that the said *John* in his life- "time, at the like instance and request of the same *Tho- "mas,* had sold and delivered to the same *Thomas* divers "other goods, wares, and merchandizes of him the said "*John,* the said *Thomas* took upon himself, and then and "there faithfully promised the same *John,* that he the afore- "said *Thomas* would well and truly pay and satisfy the said "*John* so much money for the goods, wares, and merchan- "dizes aforesaid last mentioned, as those goods, wares, and "merchandizes, at the time of the selling and delivering "thereof, were reasonably worth, when he should be af- "terwards thereunto requested: And the said *Daniel* in "fact saith, that the goods, wares, and merchandizes "aforesaid last mentioned at the time of the sale and de- "livery thereof were reasonably worth another hundred

Indebitatus assumpsit by an administrator for goods sold and delivered by the intestate.

[748]

Quantum meruit.

" shillings of like lawful money of *England*; to wit, at *Farringdon* aforesaid; and thereof the same *Thomas* then " and there had notice: Nevertheless the aforesaid *Thomas* his aforesaid promises and assumptions in form " aforesaid made not regarding, but contriving and fraudulently intending the same *John* in his lifetime, and the " aforesaid *Daniel* after the death of the said *John*, in this " behalf craftily and subtilly to deceive and defraud, hath " not paid the several sums of money aforesaid to the said " *John* in his lifetime, or the aforesaid *Daniel* after the " death of the said *John*, (to which said *Daniel* administration of all and singular the goods and chattels, rights " and credits, which were the aforesaid *John*'s at the time " of his death, was in due form committed by *Joseph Woodward*, doctor of laws, and archdeacon of the archdeaconry of *Berks*, official lawfully appointed, after the " death of the same *John*, to wit, on the tenth day of *April* " in the year of our Lord one thousand six hundred ninety " and nine, at *Farringdon* aforesaid, to which official the " committing of the administration aforesaid in this behalf did of right belong,) nor hath anywise contented " them, or either of them, for the same; although to do " this the aforesaid *Thomas*, after the death of the said " *John*, and after the administration aforesaid in form " aforesaid committed, to wit, on the twentieth day of " *April* in the eleventh year abovesaid, at *Farringdon* aforesaid, by the aforesaid *Daniel* was requested, but hath " altogether refused to pay or anywise satisfy the same " unto the said *John* in his lifetime, and the aforesaid " *Daniel* after the death of the said *John*, and still refuses " to pay or satisfy the same to the said *Daniel*: Wherefore the said *Daniel* saith, that he is injured, and hath " damage to the value of ten pounds: And therefore he " brings suit, &c.

Breach.

Letters of administration committed.

Request.

" And the same *Daniel* brings here into Court the letters of administration aforesaid of the said *Joseph Woodward*, which testify the commission of the administration " aforesaid in form aforesaid, the date whereof is on the " day and year aboveraid.

[749]

Profert of the letters of administration.

" And now at this day, to wit, *Wednesday* next after fifteen days from the day of *Easter* in this same term, until " which day the aforesaid *Thomas Cox* had leave to imparle to the aforesaid bill, and then to answer, &c. before the lord the king at *Westminster* comes as well the " aforesaid *Daniel Hillyard* by his said attorney, as the " aforesaid *Thomas Cox* by *Edward Serle* his attorney: " And the same *Thomas* defends the force and injury, " when, &c. and prays *oyer* of the aforesaid letters of administration now here produced in Court, and in the

Prays oyer of the letters of administration

"declaration aforesaid above specified; and they are read "to him in these words, to wit, *Joseph Woodward*, doctor "of laws and archdeacon of the archdeaconry of *Berkshire*, official lawfully constituted, to our beloved in "Christ *Daniel Hillyard* clerk, principal creditor of *John Cox*, when living, of *Newbery* within the county and "archdeaconry of *Berks* aforesaid, *grocer*, lately deceased, "greeting in the Lord: Whereas the said *John Cox*, so "as aforesaid deceased, lately died intestate, We there-"fore desiring that the goods, rights, and credits of the "said deceased be well and faithfully administered and "converted, and disposed to be administered to pious "uses; Therefore for the well and faithfully disposing of "the goods, rights, and credits of the aforesaid deceased, "and also for demanding, collecting, levying, and requi-"ring all credits whatsoever of the said deceased, and "which belonged to the said deceased whilst he lived, "and at the time of his death, and for the payment of "what the said deceased at such time of his death was "indebted, as far as such goods, rights, and credits ex-"tend, according to the value thereof; it is permitted "you, in whose fidelity we do in this behalf confide, "being sworn in due form of law upon GOD'S Holy "Evangelists, well and faithfully to administer the same, "and to make a full and faithful inventory of all and "singular the goods, rights, and credits of the said de-"ceased; and to exhibit the same into the registry of the "said archdeacon of *Berks* aforesaid, on or before the first "day of the month of *June* next ensuing, and also to ren-"der thereof a full and true account, calculation, or esti-"mation of and concerning your addition on or before "the first day of *March*, which shall be in the year of our "Lord one thousand six hundred and ninety and nine: "By the tenor of these presents we commit full power, "and ordain, depute, and constitute you by these presents, "administrator of all and singular the goods, rights, and "credits of the said deceased *Anne Cox*, widow and relict "of the same deceased, having first renounced in writing "the administration of the goods, *&c.* Dated at *Oxford* "under the seal of our office, on the aforesaid tenth day "of *April* in the year of our Lord one thousand six hun-"dred and ninety and nine.

[750]

Pleads that the intestate at the time of his death lived in another diocese.

"Which being read and heard, the same *Thomas* saith, "that the aforesaid *Daniel* his said action thereupon "against him ought not to have or maintain, because he "saith that the aforesaid *Thomas*, at the time of the death "of the said *John Cox*, and at the time of the commit-"ting the administration aforesaid, and long before, was "an inhabitant and resiant in the city of *Oxford* in the

" county of *Oxford*, which said city is and always was " within the diocese of *Oxford*, and out of the archdeaconry " of *Berkshire* aforesaid, and the jurisdiction of the arch- " deacon of that archdeaconry, which said archdeaconry " and the whole county of *Berkshire* aforesaid are and al- " ways were within the diocese of *Salisbury*, and not " within the diocese of *Oxford;* by which the committing " of administration of all and singular the goods and chat- " tels, rights and credits, which were the said *John Cox's* " at the time of his death, of right belonged to *Thomas* by " Divine Providence then and still archbishop of *Canter-* " *bury*, by reason of his prerogative, and not to the afore- " said archdeacon of the archdeaconry of *Berks*, or any other " inferior judge; and the said letters of administration " produced here in court are void and of no effect in law: " And this he is ready to verify: Wherefore he prays judg- " ment if the aforesaid *Daniel* ought to have or maintain " his said action thereupon against him, &c.

" And the aforesaid *Daniel Hillyard* saith, that he, not- " withstanding any matters by the aforesaid *Thomas Cox* " above in pleading alleged, ought not to be precluded " from having his said action thereupon against the same " *Thomas*, because he saith that the plea aforesaid by him " the same *Thomas*, in manner and form aforesaid above " pleaded, and the matter in the same contained, are not " sufficient in law to preclude him the said *Daniel* from " having his said action thereupon against the said *Tho-* " *mas:* To which said plea in manner and form aforesaid " above pleaded, he the same *Daniel* need not, nor is " bound by the law of the land in any manner to answer: " And this he is ready to verify: Wherefore, for want of " a sufficient plea in this behalf, the same *Daniel* prays " judgment, and his damages by occasion of the premises " to be to him adjudged, &c. And for causes of demurrer " in law, according to the form of the statute in such case " made and provided, the said *Daniel* shews and demon- " strates to the Court here these causes following, to wit, " for that it doth not appear by the plea aforesaid, that the " aforesaid *Thomas Cox* was not an inhabitant within the " diocese of the bishop of *Salisbury* at the time of the " death of the aforesaid *John Cox;* and that the said plea " is uncertain and wants form, &c. Demurrer with special causes.

" And the aforesaid *Thomas Cox* saith, that the plea " aforesaid by him the said *Thomas* in manner and form " aforesaid above pleaded, and the matter in the same " contained, are good and sufficient in law to preclude him " the said *Daniel* from having his said action thereupon " against him the said *Thomas*, which said plea, and the Joinder

"matter in the same contained, the same *Thomas* is ready "to verify and prove as the Court, &c. And because the "said *Daniel* hath not answered to that plea, nor hath "hitherto in anywise contradicted it, the said *Thomas*, as "before, prays judgment, and that the aforesaid *Daniel* be "precluded from having his action aforesaid thereupon "against the said *Thomas*, &c. But because the Court of "the said lord the king now here are not yet determined "of giving their judgment of and upon the premises, a day "is therefore given to the parties aforesaid before the lord "the king at *Westminster*, until —— day next after —— "of hearing their judgment thereon, for that the Court of "the said lord the king now here thereof not yet," &c.

Pleas before our Lord the King at Westminster, *of the Term of the* Holy Trinity *in the Twelfth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 369.

GIDLEY *against* WILLIAMS.

Salk. 37. Cases B. R. 443.

Cornwall, to wit, "BE it remembered, That heretofore, to wit, "in the term of *Easter* last past, before the lord "the king at *Westminster* came *Thomasin Gidley* widow, ad- "ministratrix of all the goods and chattels of *Richard* "her husband lately deceased, by *Peter Champion* her "attorney, and brought into the Court of the said lord "the king then there her certain bill against *Petherick* "*Williams*, otherwise called *Petherick Booth*, of the parish "of *Withiel* in the county of *Cornwall*, yeoman, in the "custody of the marshal, &c., of a plea of debt; and "there are pledges of prosecuting, namely, *John Doe* "and *Richard Roe;* which said bill followeth in these "words, that is to say, *Cornwall*, to wit, *Thomasin Gidley*, "widow and administratrix of all the goods and chattels "of *Richard Gidley* her husband lately deceased, com- "plains of *Petherick Williams*, otherwise called *Petherick* "*Booth*, of the parish of *Withiel* in the county of *Corn-* "*wall*, yeoman, in the custody of the marshal of the "*Marshalsea* of our lord the king, before the king himself "being, of a plea, that he render to her twenty pounds of "lawful money of *England*, which he oweth to her, and "unjustly detains, for that, to wit, That whereas the

Declaration by an administratrix upon a bill obligatory to the intestate.

[752]

"aforesaid *Petherick*, on the tenth day of *June* in the year "one thousand six hundred and eighty-five, at *Great St.* "*Collumbe* in the county aforesaid, by his certain bill obligatory, sealed with the seal of him the said *Petherick*, "and shewn to the Court of the said lord the king now "here, the date of which is the same day and year, acknowledgeth himself to owe and be indebted to the "same *Richard Gidley* in his lifetime, in the entire sum of "ten pounds of good and lawful money of *England*, to be "paid to the same *Richard* in his lifetime, his executors, "administrators, or assigns, at or upon the tenth day of "*December* next following the date of the aforesaid bill "obligatory, and for the true payment thereof bound "himself, his executors and administrators, in the full sum "of twenty pounds of lawful *English* money; and the said "*Thomasin* in fact saith, that the aforesaid *Petherick* did "not pay to the same *Richard* in his lifetime the aforesaid "sum of ten pounds, at or upon the tenth day of *December* next following the date of the bill obligatory aforesaid, which he ought to have paid to the said *Richard* "upon the same day, according to the form and effect of "the bill obligatory aforesaid: Whereby an action hath "accrued to the same *Richard* in his lifetime, and to the "said *Thomasin* after the death of the said *Richard*, to require and have of the aforesaid *Petherick* the aforesaid "sum of twenty-pounds: Nevertheless the aforesaid *Petherick*, although often requested, &c., hath hitherto altogether refused to pay the beforesaid twenty pounds to "the said *Richard* in his lifetime, or to the same *Thomasin* "after the death of the said *Richard*, and still refuseth to "pay the same to the said *Thomasin*, to the damage of the "said *Thomasin* of twenty and five pounds: And therefore she brings suit, &c. And the aforesaid *Thomasin* "brings here into court the aforesaid letters of administration of the aforesaid *Richard*, whereby it sufficiently appears to the Court here, that the aforesaid *Thomasin* is "the administratrix of the aforesaid *Richard*, and thereupon hath administration, &c.

N. B. Defendant not having demurred, the bringing this action in the debet and detinet is cured by the verdict. 1 Sid. 342, 379. Show. 57.

The granting letters of administration ought to have been inserted here.

"And now at this day, to wit, *Friday* next after the "morrow of the *Holy Trinity* in the same term, to which "day the aforesaid *Petherick* had leave to imparle to the "said bill, and then to answer, &c. before the lord the "king at *Westminster*, comes as well the aforesaid *Thomasin* by her said attorney; and the same *Petherick*, by "*Joseph Hawkey* his attorney; and the same *Petherick* defends the force and injury, when, &c., and saith that he "ought not to be charged with the debt aforesaid by virtue of the said bill obligatory, because he saith that the

Imparlance

"aforesaid bill is not his deed: And of this he puts him-"self upon the country; and the aforesaid *Thomasin* in "like manner, *&c.*

"Therefore let a jury come thereupon before the lord "the king at *Westminster*, on *Wednesday* next after three "weeks from the day of the *Holy Trinity;* and who nei-"ther, *&c.* to recognize, *&c.*, because as well, *&c.* The

[753] Postea continued.

"same day is to the parties aforesaid there, *&c.* After-"wards the proceedings are thence continued between the "aforesaid parties of the plea aforesaid, by the jury re-"spited thereupon between them, before the lord the king "at *Westminster*, until *Wednesday* next after three weeks "from the day of the *Holy Trinity* then next following, "unless the justices of the lord the king appointed to take "the assizes in the county aforesaid first come on the "ninth day of *August* at *Launceston* in the county afore-"said, by form of the statute, *&c.*, for default of jurors, "*&c.* At which day, before the lord the king at *West-"minster*, comes the aforesaid *Thomasin* by her said attor-"ney; and the beforesaid justices of the lord the king, "before whom, *&c.* sent here their record had before "them in these words: Afterwards, at the day and place

Return of the postea.

"within mentioned, before Sir *John Powell*, Knt., one of "the justices of our lord the king of the bench of our said "lord the king appointed to take the assizes in the coun-"ty of *Cornwall*, and *Francis Swanton*, Esq., associate to the "same *John Powell*, for this turn, by the form of the sta-"tute, *&c.*, came the within-named *Thomasin Gidley*, wi-"dow, by her attorney within mentioned; and the with-"in-named *Petherick Williams*, although solemnly re-

Default.

"quired, did not come, but made default: Therefore let "the jury, whereof mention is within made, be taken

Verdict for the plaintiff.

"against him by default. And the jurors of that jury be-"ing summoned came, who being elected, tried, and "sworn to speak the truth of the within contents, upon "their oath say, that the bill obligatory within mentioned "is the deed of the aforesaid *Petherick Williams*, as the "aforesaid *Thomasin* hath within against him declared, "and assess the damages of the said *Thomasin*, by occasion "of the detention of the within-written debt, over and "above her costs and charges by her about her suit in "this behalf applied, to two-pence, and for those costs "and charges to forty shillings: Therefore it is consider-"ed, that the aforesaid *Thomasin* do recover against the "aforesaid *Petherick* her said debt and the damages afore-"said by the jury in form aforesaid assessed; and also "thirteen pounds and ten shillings for her costs and "charges by the Court of the said lord the king now here

" adjudged to the said *Thomasin*, by her assent, of in-
" crease: Which said damages in the whole amount to fif-
" teen pounds ten shillings and two pence; and that the
" said *Pethcrick* be taken," &c.

Pleas before our Lady the Queen at Westminster, *of the Term of the* Holy Trinity *in the Third Year of the Reign of the Lady* Anne, *now Queen of England,* &c. *Roll* 90. [754]

SLATER *against* MAY.

London, to wit, " BE it remembered, That heretofore, to wit, " in the term of *Easter* last past, before the lady " the queen at *Westminster* came *John Slater*, administra- " tor of all and singular the goods, rights, and credits " which were *Christopher Youlden's* deceased at the time " of his death, by *Thomas Moore* his attorney, and brought " into the court of the said lady the queen then there his " certain bill against *John May* in the custody of the mar- " shal, &c., of a plea of trespass upon the case; and there " are pledges of prosecuting, namely, *John Doe* and *Richard* " *Roe;* which said bill followeth in these words, that is to " say, *London*, to wit, *John Slater*, administrator of all and " singular the goods, rights, and credits which were *Christo-* " *pher Youlden's* deceased, at the time of his death, com- " plains of *John May*, in the custody of the marshal of the " *Marshalsea* of the lady the queen, before the queen her- " self being, for that, to wit, That whereas the aforesaid " *John May*, on the twenty-third day of *January* in the " year of our Lord one thousand six hundred and ninety " and nine, at *London*, to wit, in the parish of St. *Mary le* " *Bow* in the ward of *Cheap*, was indebted to the said *Chris-* " *topher* in his lifetime in thirty pounds of lawful money of " *England*, for so much money of the same *Christopher* in " his lifetime, by him the said *Christopher* in his lifetime " to the said *John May*, at the special instance and request " of him the said *John May*, before that time lent and " accommodated; and being so thereupon indebted, he " the said *John May*, in consideration thereof, afterwards, " to wit, the same day and year abovesaid, at *London* " aforesaid in the parish and ward aforesaid, took upon " himself, and then and there faithfully promised the said

3 D. 351. p. 4. 6 Mod. 304. 3 Salk. 23. Salk. 42.

Declaration by an administrator during the absence of the executor, for money lent by the intestate

Indebitatus assumpsit.

"*Christopher* in his lifetime, that he the said *John May* "would well and faithfully satisfy and pay the aforesaid "thirty pounds to the same *Christopher*, when afterwards "he should be thereunto requested: And whereas also the "aforesaid *John May* afterwards, to wit, the same day and "year abovesaid, at *London* aforesaid in the parish and "ward aforesaid, was indebted to the said *Christopher* in "his lifetime in other thirty pounds or like lawful money of

[755] "*England*, for so much money of him the said *Christopher* in "his lifetime by the said *John May* for the same *Christopher*, and to the use of him the said *Christopher*, before "that time had and received, and being so indebted, the "aforesaid *John May* afterwards, to wit, the same day and "year abovesaid, at *London* aforesaid, in the parish and "ward aforesaid, in consideration thereof, took upon himself and then and there faithfully promised the same "*Christopher* in his lifetime, that he the said *John May* "would well and truly pay and satisfy the said thirty "pounds last mentioned to the said *Christopher*, when he "should be thereunto afterwards requested: Nevertheless the said *John May* his several promises and undertakings aforesaid in form aforesaid made not regarding, "but contriving and fraudulently intending in this behalf "craftily and subtilly to deceive and defraud the said "*Christopher* in his lifetime, and the said *John Slater* "after the death of the said *Christopher*, of the said several sums of money (to which said *John Slater* administration of all and singular the goods, rights, and credits "which were the aforesaid *Christopher Youlden's* at the "time of his death, with his will annexed, for the use and "benefit and during the absence of *Elizabeth Viltery*, the "executrix named in the said will, by *Thomas* by Divine "Providence archbishop of *Canterbury*, primate and metropolitan of all *England*, on the fifteenth day of *October* "in the year of our lord one thousand seven hundred and "three, at *London* aforesaid in the parish and ward aforesaid were in due form of law committed) hath not paid "the said several sums of money, or any part thereof, to the "said *Christopher* in his lifetime, or to the said *John Slater* "after the death of him the said *Christopher*, nor hath "hitherto in any manner contented them for the same "(although to do this the aforesaid *John May* by the said "*Christopher* in his lifetime, and by the said *John Slater* "after the death of the said *Christopher*, and the committing of the administration aforesaid at *London* aforesaid in the parish and ward aforesaid was requested); "but altogether refused to pay or in any manner to satisfy the same unto the said *Christopher* in his lifetime,

Another indebitat. assump. for money had and received to the intestate's use.

Breach.

Letters of administration set forth.

Request.

" and yet refuseth to pay them to the said *John Slater*, to " the damage of him the said *John Slater*, of forty pounds: " And thereupon he brings suit, &c. And the said *John* " *Slater* brings here into Court the said letters of admin-" istration aforesaid of the said archbishop, which testify " the commission of the administration aforesaid to the " said *John Slater* in form aforesaid, the date whereof is the " same day and year in that behalf above mentioned, &c.

" And now at this day, to wit, *Friday* next after the " morrow of the *Holy Trinity* in this same term, until " which day the said *John May* had leave to imparle to " the aforesaid bill, and then to answer, &c. before the " lady the queen at *Westminster* comes as well the said " *John Slater* by his said attorney, as the said *John May* " by *Richard Gates* his attorney: And the same *John May* " defends the force and injury, when, &c. and saith that " the declaration aforesaid, and the matter therein con-" tained, are not sufficient in the law for the said *John* " *Slater* to have and maintain his said action thereupon " against him the said *John May*; and that he hath no " need, nor is bound by the law of the land in any manner " to answer the said declaration in any manner aforesaid " declared: And this he is ready to verify: Wherefore " for defect of a sufficient declaration in this behalf, the " said *John May* prays judgment, if the said *John Slater* " ought to have this said action against him the said *John* " *May*, &c. And for causes of demurrer in law in this be-" half, the same *John May*, according to the form of the " statute in such case lately made and provided, sheweth " and pointeth out to the Court here these causes follow-" ing, to wit, That the declaration aforesaid is altogether " uncertain, double insensible, insufficient in law, and " wants form, &c. And the aforesaid *John Slater* saith, " that notwithstanding any thing by the said *John May* " above alleged, the declaration aforesaid of the said *John* " *Slater* ought not to be quashed, because he saith that the " declaration aforesaid, and the matter in the same con-" tained, are good and sufficient in the law for him the " said *John Slater* to have and maintain his said action " thereon against him the said *John May*: Which said de-" claration and the matter in the same contained the said " *John Slater* is ready to verify and prove as the Court, " &c. And because the aforesaid *John May* hath not an-" swered to that declaration, nor hath hitherto anywise " contradicted it, the said *John Slater* prays judgment and " his damages by occasion of the premises to him to be " adjudged, &c.

Demurrer to the declaration.

[756]

Joinder

"But because the Court of our said lady the queen now "here are not yet determined of giving their judgment of "and concerning the premises aforesaid, a day therefore is "given to the aforesaid parties before the lady the queen "at *Westminster*, until —— day next after —— of hear-"ing their judgment of and concerning the said premises, "for that the Court of the said lady the queen here there-"of are not yet," *&c.*

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[757] *Pleas before the Lord the King at* Westminster, *of the Term of* St. Michael *in the Eleventh Year of the Reign of the Lord* William *the Third, now King of* England, *&c.* *Roll* 377.

THE BISHOP OF SALISBURY *against* PHILLIPS.

[3 Ld. Raym. Entries 451. S. C.]

Salk. 43. Carth. 504. Holt 52. S. C.

"THE lord the king hath given in charge to his be-"loved and faithful Sir *George Treby*, Knt. his Chief Jus-"tice of the Bench, his writ closed in these words, to "wit, *William* the Third, by the grace of GOD, of *En-"gland*, *Scotland*, *France*, and *Ireland* King, Defender of "the Faith, *&c.* To his beloved and faithful Sir *George* "*Treby*, Knt. his Chief Justice of the Bench, greeting:

Writ of error.

"Because in the record and proceedings, and also in the "giving of the judgment of the complaint which was in "our Court before you and your brethren our justices "of the Bench aforesaid, by our writ between *William* "*Phillips*, executor of the will of *William Phillips*, Gen-"tleman, his father lately deceased, and *Gilbert* bishop "of *Salisbury* and *John Berrow* clerk, to the end that "the same bishop and *John* should permit him the "said *William Phillips*, the now plaintiff, to present a "fit person to the church of *Stanton*, otherwise *Stanton* "*Fitz-Warren*, otherwise *Stanton Fitz-Herbert*, in the "county of *Wilts*, which was vacant, and did belong to "his gift, as it was said, manifest error intervened, to "the great damage of them the said bishop and *John*, "as we have been informed from his complaint, We "being willing that the error (if any was) should be in "due manner corrected, and that full and speedy justice

"should be done to them the said bishop and *John*, in this "behalf, do command you, that if judgment be thereupon "given, then that you distinctly and plainly send the re- "cord and proceedings aforesaid with all things to them "belonging, unto us under your seal, and this writ; so "that we may have them from the day of *Easter* in five "weeks wheresoever we shall then be in *England*, that "we having inspected the record and proceedings afore- "said, may cause to be done that which of right and "according to the law and custom of our kingdom of "*England* is most fit to be done further thereupon for "correcting the error. Witness our self at *Westminster* "the twenty-sixth day of *April* in the eleventh year of "our reign.

Hale.

"The answer of Sir *Geo. Treby*, Knt. Chief Justice "within named. [758]

"The record and proceedings of the complaint whereof "mention is within made, with all things concerning the "same, before the lord the king, wheresoever, &c. at the "day within mentioned, I send in a certain record to this "writ annexed, as within I am commanded.

Geo. Treby.

"Pleas inrolled at *Westminster* before Sir *George Treby*, "Knt. and his brethren, justices of our lord the king, of "the Bench, of the term of the *Holy Trinity* in the tenth "year of the reign of our lord *William* the Third, by the "grace of God, of *England*, *Scotland*, *France*, and *Ireland* "King, Defender of the Faith, &c. *Roll* 1562.

Quare impedit by the executor of William Phillips.

"*Wilts*, to wit, *Gilbert*, bishop of *Salisbury*, and *John* "*Berrow*, clerk, were summoned to answer *William Phil-* "*lips*, Gent. executor of the last will and testament of "*William Phillips*, Gent. his father lately deceased, of "a plea, that they permit him the said *William Phillips*, "now plaintiff, to present a fit person to the church of "*Stanton*, otherwise *Stanton Fitz-Warren*, otherwise *Stan-* "*ton Fitz-Herbert*, which is vacant [or void] and belongs "to his gift, &c. And whereupon the same *William* "*Phillips*, now plaintiff, by *Dennis Russell* his attorney "saith, That whereas one *Richard Organ* and one *John* "*Organ* were seised as of fee and right of the advowson "of the aforesaid church in gross, and being thereof so "seised, the aforesaid *Richard Organ* and *John Organ* on "the twenty-sixth day of *June* in the thirteenth year of "the reign of *James* the First, late king of *England*, at "*Stanton* aforesaid in the county aforesaid, by their cer-

Declares upon agreement by indenture between jointenants to present by turns.

"tain indenture made between the said *Richard Organ*. "by the name of *Richard Organ* of *Lamborn* in the county "of *Berks*, Gent. of the one part, and the said *John Organ*, "by the name of *John Organ* of *Stanton* within the hundred "of *Highworth* in the county of *Wilts*, Gent. of the other part, "the other part whereof, sealed with the seal of the said "*John Organ*, the same *William Phillips* now plaintiff brings "here into Court, the date whereof is on the same day "and year concluded and agreed between themselves, "that they the said *Richard Organ* and *John Organ*, should "be thereupon seised in common, not jointly, of the ad-"vowson of the church aforesaid, that is to say, that the "said *Richard Organ* should stand and be seised, and "have, hold, and enjoy one moiety of the said advowson "to him and his heirs, and that the said *John Organ* "should stand and be seised, and have, hold, and enjoy "the other moiety of the said advowson to him and his "heirs and that the said *Richard Organ* and *John Organ* "and their several heirs, so often as the said church of "*Stanton* should become vacant [or void] severally and "respectively should present by several turns one after "another in manner and form following, to wit, that the "said *Richard Organ* and his heirs might present to the "said church at the first turn when the said church should "happen first and next to be vacant [or void] for it; and "that the said *John Organ* and his heirs might present to "the said church when the same should then next be "vacant [or void] the second time; and so the said *Richard Organ* and *John Organ* severally and their several "and respective heirs, in their several turns alternately, "as the same church at any time thereafter should be-"come vacant [or void] should or might present their "clerks according to the order and course concluded and "agreed upon as before is mentioned, as by the same "indenture amongst other things more fully appears; "whereby the same *Richard* and *John* were seised "of the advowson aforesaid to be presented to the same "church in form aforesaid; and being so seised thereof, "the said *Richard Organ*, after the making of the said "indenture, beginning his first turn, and as in his first "turn at *Stanton* aforesaid, presented to the said church, "being vacant, one *John Woodbridge* his clerk, who "at the presentation of the same *Richard Organ* was "there admitted and instituted in the same, in time of "peace, in the time of our lord *James* the First, late "King of *England*. And afterwards the church aforesaid "became vacant by the death of the said *John Woodbridge* "there, whereby the said *John* presented to the same

Profert of the indenture.

[759]

First presentation.

Vacancy by death. Second presentment.

" church so vacant [or void] as in the second turn, at *Stanton* aforesaid, *Thomas Holchkis* his clerk, who at the presentation of him the said *John Organ* was admitted and instituted in the same, in time of peace, in the time of our lord *Charles* the First, late King of *England;* and the aforesaid *Richard Organ* and *John Organ* being so seised of the advowson aforesaid, the said *Richard Organ* afterwards, at *Stanton* aforesaid, died seised of such his estate, by and after whose death a moiety of the advowson aforesaid descended to one *John Organ* as brother and heir of the said *Richard Organ*, whereby the same *John Organ* as brother was seised of the moiety of the advowson aforesaid as of fee and right to present in form aforesaid; and being so seised thereof, afterwards, to wit, on the twenty-fifth day of *August* in the fourteenth year of the reign of the said late king *Charles* the First, by a certain indenture made between him the said *John Organ* of the one part, and one *Richard Hippesley* of *Stone Easton* in the county of *Somerset*, Gentleman, nephew of the said *John Organ* the brother, to wit, second son of *Elizabeth Hippesley* widow, natural sister of the said *John Organ* the brother, of the other part, made at *Stanton* aforesaid, in the county aforesaid, the other part whereof, sealed with the seal of the said *John Organ* the brother, the same *William Phillips* the now plaintiff produces here in Court, the date whereof is the same day and year last abovesaid; and in consideration of the natural love and affection which he had and bore towards the said *Richard Hippesley*, and in consideration of the blood between them, and for the better preferment, advancement, maintenance, and livelihood of the said *Richard Hippesley* and his brother, in the same indenture afterwards named, he the said *John Organ* the brother, for himself and his heirs, covenanted, granted, and agreed to and with the said *Richard Hippesley* and his heirs, that he the said *John Organ* the brother, his heirs and assigns, and every of them, and all and every other person and persons and their heirs, who then were or thereafter should stand and be seised of and in the said moiety of the advowson aforesaid, should stand and be siesed of the same, to the use and behoof of the said *Richard Hippesley*, and the heirs of the body of the said *Richard Hippesley* lawfully to be begotten; and for want of such issue, to the use and behoof of *Robert Hippesley*, brother of the said *Richard Hippesley*, and the heirs of the body of the said *Robert Hippesley*, lawfully to be begotten; and for default of such issue, to the use and behoof of the said *John Organ* the brother, and his heirs and assigns for

Descent of one moiety.

Another agreement by indenture.

Consideration.

[760]

Settled in tail to the uses declared.

"ever; and to no other uses, intents, or purposes whatsoe-"ver, as by the said indenture last mentioned more fully "appears; by virtue of which said indenture, and by force "of a certain act, made and provided in the parliament "of our lord *Henry* the Eighth, late King of *England*, "held at *Westminster* in the county of *Middlesex* on the "fourth day of *February* in the twenty-seventh year of his "reign, of transferring uses into possession, the aforesaid "*Richard Hippesley* was seised of a moiety of the advowson "aforesaid, as of fee-tail and right belonging to the re-"mainder thereof in form aforesaid, to wit. to present in "form aforesaid; and the said *Richard Hippesley* being so "seised thereof, afterwards, at *Stanton* aforesaid, in the "county aforesaid, died, by and after whose death the "said moiety of the advowson aforesaid descended to *Rich-"ard Hippesley*, Esq. as son and heir of the body of the "said *Richard Hippesley*, whereby the same *Richard Hip-"pesley* the son was seised of the said moiety of the advow-"son aforesaid as of fee-tail and right: And the same *Rich-"ard Hippesley* the son being so seised thereof, afterwards, "at *Stanton* aforesaid, died without issue of his body, by "and after whose death the said moiety of the advowson "aforesaid descended to *John Hippesley*, Esq. as son and "heir of the body of the said *Richard Hippesley* first named, "whereby the said *John Hippesley* was seised of the said "moiety of the advowson aforesaid as of fee and right. "And the said *John Hippesley* being so thereof seised, af-"terwards, to wit, the sixteenth day of *January*, in the "twenty-fourth year of the reign of our lord *Charles* the Se-"cond, late King of *England*, at *Stanton* aforesaid, in the "county aforesaid, by his certain writing, which the same "*William Phillips* the now plaintiff produces here in court, "sealed with the seal of the said *John Hippesley*, the date "of which is the same day and year, did give and grant "to *Francis Symes* the elder of *Kelmescot* in the county of "*Oxford*, Gentleman, and *William Phillips* the testator of "*Eaton Hastings* in the county of *Berks*, Gentleman, his "executors and assignees, the first and next advowson, "donation, nomination, presentation, and free disposition "of the said parish church of *Stanton*, otherwise called "*Stanton Fitzherbert*, otherwise *Stanton Fitzwarren*, will-"ing, and by his same writing granting, that it should and "might be lawful to and for the said *Francis Symes* and "*William Phillips* the testator, their executors and assig-"nees, to present to the said church of *Stanton Fitzherbert*, "otherwise *Stanton Fitzwarren*, whensoever or howsoever "by death, resignation, deprivation, cession, permutation, "dismission, or any other way whatsoever, by which the "same church should happen then first and next to be va-

Grant of the next avoidance to the testator and Fr. Symes, their executors and assigns.

[761]

"cant [or void] any honest and learned clerk for the then "next turn only, as by the writing aforesaid more fully ap- "pears; by virtue of which grant the same *Francis Symes*, "and *William Phillips* the testator were possessed of the "advowson of the church of *Stanton* aforesaid; that is to "say, to present to the same church, when first and next "it should happen to be vacant; and being so possessed "thereof, the said *Francis Symes*, afterwards, at *Stanton* "aforesaid, in the county aforesaid, died, and the said *Wil- "liam Phillips* the testator survived, and then was posses- "sed of the advowson aforesaid by right of *survivorship*, &c.* "And the said *William Phillips* the testator being so there- "of possessed the said church in the lifetime of the said "*William Phillips* the testator was vacant [or void] by the "death of the said *Thomas Hotchkis*, and still remains va- "cant [or void]; which said vacancy [or avoidance] of the "church aforesaid by the death of the aforesaid *Thomas "Hotchkis*, is the first and next vacancy [or avoidance] of "the said church after the aforesaid grant to the same "*Francis Symes* and *William Phillips* by the said *John Hip- "pesley* in form aforesaid made, and for that reason it be- "longed to the said *William Phillips* the testator in his life- "time, to present a fit person to the church aforesaid so "vacant [or void]; and the said bishop and *John Berrow* "have unjustly hindered him the said *William Phillips* the "testator; and the said *William Phillips* the testator, the "said church being so vacant [or void] as aforesaid, after- "wards, to wit, on the twenty-first day of *June* in the sixth "year of the reign of our lord the now King, and of the "lady *Mary* late Queen of *England*, &c., at *Stanton* afore- "said, in the county aforesaid, made his last will and tes- "tament, and by the same did constitute and ordain the "said *William Phillips* the now plaintiff, executor of his said "will, and afterwards there died; and after the death of "which said *William Phillips* the testator, the said *William "Phillips* the now plaintiff took upon himself the burthen "and execution of the said will, and that will hath proved "in due form of law, to wit, at *Stanton* aforesaid, and for "that reason at present it belongs to him the said *William "Phillips* the now plaintiff, to present a fit person to the "said church so vacant [or void]: And the said bishop and "*John Berrow* do unjustly hinder him the said *William Phil- "lips* the now plaintiff; wherefore the same *William Phillips* "the now plaintiff saith that he is injured, and has damage "to the value of six hundred pounds: And therefore he "brings suit, &c. With this, that the said *William Phil- "lips* the now plaintiff will verify that the said *John Hip- "pesley* is still living and in full life, to wit, at *Stanton*

Francis Symes one of the grantees dies, and the plaintiff's testator survives.

The vacancy in the testator's life.

Testator made his will, and the plaintiff his executor.

Will proved

[762]

Avers the life of the grantor and

the identy of the church.

"aforesaid, in the county aforesaid; and that the church "of *Stanton*, otherwise *Stanton Fitzwarren*, otherwise *Stanton* "*Fitzherbert*, is one and the same church, and not another "nor different: And he brings here into the court the let-"ters testamentary of the said *William Phillips* the testa-"tor, by which it sufficiently appears to the Court here, "that the said *William Phillips* the now plaintiff is execu-"tor of the said will, and has administration thereof, &c.

Plea parson imparsonee.

"And the said *Gilbert* bishop of *Salisbury*, and *John Ber-*"*row* clerk, by *John Carpenter* their attorney, come and de-"fend the force and injury when, &c. And the said *John Ber-*"*row* saith, that he is a parson *imparsonee* of the church "aforesaid by the collation of the said bishop; and the said "bishop and *John Berrow* further say, that the said *William* "*Phillips* the executor ought not to have his said action "against them; because they say, that the said church "of *Stanton*, otherwise, *Stanton Fitzwarren*, otherwise "*Stanton Fitzherbert*, was vacant [or void] by the death of "the said *Thomas Hotchkis*, on the twentieth day of *Sep-*"*tember* in the year of our Lord one thousand six hundred "ninety and three, and remained so vacant until the twen-"ty-third day of *April* in the year of our Lord one thousand "six hundred ninety and four, on which day at *Stanton* "aforesaid the said bishop, because at that time six months "after the vacancy [or avoidance] of the same church were "fully elapsed and devolved, being the ordinary of that "place, collated the said *John Berrow* clerk to that church "then being vacant, as it was lawful for him: And this "they are ready to verify: Wherefore they pray judgment "if the said *William* the executor ought to have his said "action against them, &c.

Admit the vacancy, and that after six months the bishop presented by lapse.

Replies and admits the time of the vacancy.

"And the said *William Phillips* "the executor saith, that he, notwithstanding any matters "before alleged, ought not to be precluded from having "his said action, because he saith that well and true it is "that the aforesaid church of *Stanton*, otherwise *Stanton* "*Fitzwarren*, otherwise *Stanton Fitzherbert*, by the death of "the said *Thomas Hotchkis* on the said twentieth day of "*September* in the year of our Lord one thousand six "hundred ninety-three abovesaid, was vacant [or void] "as the said bishop and *John Berrow* in pleading have alle-"ged: But the same *William Phillips* the executor further "saith, that after the said twentieth day of *September* in "the year of our Lord one thousand six hundred ninety "and three abovesaid, and before the said twenty-third day "of *April* in the year of our Lord one thousand six hundred "ninety and four, within six months after the death of the "said *Thomas Hotchkis*, to wit, on the sixteenth day of "*October* in the year of our Lord one thousand six hundred

But says that within the six months, to wit, 16 of Oct. 1693, the testa-

" ninety and three, the said *William Phillips* the testator, " by his writing sealed with his seal, the date of which is " on the same sixteenth day of *October* in the year of our " Lord one thousand six hundred ninety and three, at " *Stanton* aforesaid, in the county aforesaid, the said bishop " being then ordinary of the said place of *Stanton*, other- " wise *Stanton Fitzwarren*, otherwise *Stanton Fitzherbert*, " presented one *John Symes*, master of arts, his clerk; " and then and there requested the said bishop to admit " and institute the same *John Symes* to the church aforesaid so vacant by the death of the said *Thomas Hotchkis*, which said *John Symes* the said bishop then and there altogether refused to admit and institute to the said " church, at the aforesaid presentation of the said *William* " *Phillips* the testator, and hindered him the said *William* " *Phillips* the testator from presenting: And this he is " ready to verify: Wherefore he prays judgment and " damages by occasion of the hinderance [or impediment] " aforesaid, and also a writ to the said bishop to him to " be adjudged, *&c.*

tor by writing presented J. Symes, and requested the bishop to admit him, who refused.

[763]

" And the said bishop and *John Berrow* say, that well " and true it is, that the said *William Phillips* the testator, " by his writing sealed with his seal, did present the said " *John Symes*, as the same *William* the executor hath above " in his replication alleged: But the said bishop and *John* " *Berrow* further say, that afterwards, and within six " months after the avoidance [or vacancy] of the said " church, to wit, on the said sixteenth day of *October* in " the year of our Lord one thousand six hundred ninety " and three abovesaid, the said *John Symes* at *Stanton* " aforesaid brought the presentation aforesaid to the said " bishop, and required the said bishop to give the said " *John Symes* a few days to prepare himself to be examined " concerning his sufficiency in learning to have the church " aforesaid; and that the said bishop thereupon, at the " request of the said *John Symes*, then and there did " give leave to the said *John Symes* to go away, and " there to return to the said bishop within three days next " following, to be examined of his sufficiency aforesaid, " which said three days were ended long before the end " of six months after the vacancy [or avoidance] of the " church aforesaid by the death of the said *Thomas Hotch-* " *kis*, that is to say, by the space of one month, to wit, " at *Stanton* aforesaid. And the said bishop and *John* " *Berrow* further say, that he the same bishop, for the " said three days afterwards, was there ready to examine " the said *John Symes* concerning his sufficiency afore- " said; and that the said *John Symes*, neither within the " said three days, nor ever afterwards, did return or

Rejoin and admit the presentation, but say, That J. Symes took it away, and desired time to prepare himself for examination, and never returned.

" offer himself to the said bishop to be examined concerning his said sufficiency; by which the said church remained void [or vacant] for the space of six months and upwards after the aforesaid vacancy or avoidance by the death of the said *Thomas Hotchkis;* whereupon the said bishop collated the said *John Berrow* to the said church so vacant [or void]; which said *John Berrow* was afterwards inducted into the same church in due form of law, without this, that the said bishop altogether refused to admit and institute the said *John Symes* to the church aforesaid at the presentation of the said *William*

[764]

Phillips the testator, as the said *William Phillips* the executor hath above alleged: And this they are ready to verify: Wherefore they pray judgment, and that the said *William* the executor from his said action be precluded, *&c.*

Traverses his refusal to admit J. Symes.

Surrejoinder and issue upon the traverse.

" And the said *William Phillips* the executor, as before saith, That the said bishop hath altogether refused to admit and institute the said *John Symes* to the church aforesaid, at the presentation of the said *William Phillips* the testator, as the said *William Phillips* the executor hath above in his replication thereupon alleged: And they pray that this may be inquired of by the country: And the said bishop and *John Berrow* likewise, *&c.*

Continuances by non mis. breve.

" Therefore the sheriff is commanded, that he cause to come here in three weeks from the day of the *Holy Trinity*, twelve, *&c.*, by whom, *&c.*, and who neither, *&c.*, to recognize, *&c.*, because as well, *&c.* At which day the parties come here, *&c.* And the sheriff hath not returned the writ: Therefore, as before, the sheriff is commanded, that he cause to come here in three weeks from the day of St. *Michael*, twelve, *&c.*, to recognize in form aforesaid, *&c.* At which day the parties come here, *&c.*, and the sheriff hath not returned the writ: Therefore, as before, the sheriff is commanded, that he cause to come here in eight days from the day of the Purification of the Blessed *Mary*, twelve, *&c.*, to recognize in form aforesaid, *&c.* At which day the jury between the said parties of the aforesaid plea was respited thereon between them here until this day, to wit, in fifteen days from the day of *Easter* then next following, unless the justices of our Lord the king appointed to take the assizes in the county aforesaid, by the form of the statute, *&c.*, first come on *Saturday* the eleventh day of *March* past, at *New Sarum* in the county aforesaid; and now here at this day comes the said *William* by his said attorney, and the said justices appointed to take assizes, before, *&c.*, have sent here their record in these words, to wit, Afterwards at the day and place within

" contained, before Sir *Thomas Rokeby*, Knt. one of the ' justices of our lord the king appointed to hold pleas be- ' fore the king himself, and Sir *John Powell*, Knt. one of ' the justices of the said lord the king of the bench, jus- ' tices of the said lord the king, appointed to take assizes ' in the county of *Wilts*, by form of the statute, &c., came " as well the within-named *William Phillips*, Gent. executor " of the last will and testament of *William Phillips*, Gent. " his father lately deceased, as the within-named *Gilbert* " Bishop of *Salisbury*, and *John Berrow* clerk, by their at- " tornies within mentioned: and the jurors of the jury, " whereof mention is within made, being summoned, like- " wise came, who being elected, tried, and sworn to speak " the truth of the within contents, upon their oath, say, that " the said *Gilbert* Bishop of *Salisbury*, altogether refused " to admit and institute the within-named *John Symes* to " the church within mentioned on presentation of the " said *William Phillips* the testator, as the said *William* " *Phillips* the executor hath within thereupon in his repli- " cation alleged. And the said jurors upon their oath " further say, that the church aforesaid is full of the said " *John Berrow* by the collation of the said *Gilbert* Bishop " of *Salisbury*, as is by him within alleged, and that the " church aforesaid is, and from the time in which, &c., " was of the yearly value of one hundred and twenty " pounds in all issues beyond reprisals: And the jurors " aforesaid assess the damages of the said *William Phillips* " the executor, for his costs and charges by him concern- " ing his suit in this behalf applied, to forty shillings; " therefore no respect being had to the beforesaid forty " shillings of the damages, costs, and charges aforesaid, " assessed by the said jury by occasion of the hindrance " aforesaid, because such damages by the law of the land " are in nowise in this case to be adjudged; it is consid- " ered that the said *William Phillips* the executor do recover " against the said Bishop of *Salisbury* and *John Berrow*, " his presentation to the church aforesaid, and his damages " to the value of that church for the half of one year, which " amounts to sixty pounds, by the jury aforesaid in form " aforesaid assessed; and let him have a writ to the Arch- " bishop of *Canterbury*, Primate of all *England*, and Metro- " politan of that place, for that the said Bishop of *Salisbury* " is a party, &c., because the said *John Berrow* is admitted " and instituted to the same church at the collation of the " said Bishop of *Salisbury*, and is inducted in the same, to " remove the said *John Berrow* from the said church, and " that he may admit a fit person to the said church at the " presentation of the said *William Phillips* the executor;

Return of the postea.

Find that the bishop refused to admit upon the plaintiff's presentation; and the church full upon the bishop's collation, and the yearly value 120 l.

[765]

Judgment and awarding a writ to the bishop.

"and the aforesaid Bishop of *Salisbury* and *John Berrow* in "mercy, *&c.* Afterwards, to wit, on *Monday* next after "three weeks from the day of St. *Michael* in this same term, "before our lord the king at *Westminster*, come the afore- "said bishop and *John Berrow* by *Adrian Moore* their at- "torney, and say, that in the record and proceedings afore- "said, and also in the giving of the judgment aforesaid. "there is manifest error, in this, to wit, that by the record "aforesaid it appears that the said judgment given in form "aforesaid was given for the said *William Phillips* "against the said bishop and *John Berrow*, where by the "law of the land of this kingdom of *England*, that judg- "ment ought to have been given for the said bishop and "*John Berrow* against the same *William Phillips*, therefore "in that there was manifest error: There is also error in "this, to wit, that the record aforesaid before the lord the "king now here sent is defective in this, to wit, that the "original writ, and the return of the same between the "parties aforesaid in the plea aforesaid, are totally omitted "out of the said record, and yet remain in the custody of "the keeper of the writs of the lord the now king of the "bench, not certified to the same lord the king. And the "same bishop and *John Berrow* pray a writ of the said lord "the now king to be directed to the keeper of the writs "of our said lord the now king, of the bench aforesaid, to "certify the writ aforesaid, together with the return of the "same writ to the said lord the king: And it is granted to "them, *&c.*, whereby it is given in charge to *William* "*Thursby*, Esq. keeper of the writs of our lord the king of "the bench aforesaid, that having searched for the original "writs in the county of *Wilts*, of the term of the *Holy* "*Trinity* in the eighth year of the reign of our said lord "the now king, being in his custody of record, he may send "what he shall find in the same concerning the aforesaid "writ, together with the whole return of the same writ, "as fully and entirely as they remain in his custody, to the "lord the king, without delay, wheresoever, *&c.*, together "with the writ of the said lord the king, to himself there- "upon directed, *&c.* Which said keeper of writs, by "virtue of that writ to him thereupon directed, hath cer- "tified to the same lord the king, that having searched all "the original writs of his county of *Wilts*, of the said term "of the *Holy Trinity* in the eighth year of his reign, in "his custody filed of record, he hath a certain original "writ between the parties aforesaid of the plea aforesaid "in his custody filed of the same term, the tenor of which "said writ, together with the return of the same, fol- "loweth in these words: *William* the Third, by the grace

Misericordia.

Errors assigned.

Certiorari.

[766]

Quare impedit returned

" of GOD, of *England*, *Scotland*, *France*, and *Ireland* King,
" Defender of the Faith, *&c.* To the sheriff of *Wilts*,
" greeting: Command *Gilbert* Bishop of *Salisbury*, and *John*
" *Berrow* clerk, that justly and without delay, they permit
" *William Phillips*, executor of the will of *William Phil-*
" *lips* his father lately deceased, to present a fit person to
" the church of *Stanton*, which is vacant [or void], and be-
" longs to his gift, as he saith, and whereof he complains
" that the said bishop and *John* do unjustly hinder him:
" And unless they shall so do, and the said executor shall
" make you secure of prosecuting his claim, then summon
" by good summoners the aforesaid bishop and *John*, that
" they before our justices at *Westminster*, from the day of
" the *Holy Trinity* in fifteen days, to shew wherefore they
" have not so done: And have you there the summoners
" and this writ. Witness, *Thomas* Archbishop of *Canter-*
" *bury*, and the rest of the keepers and justices of the realm
" at *Westminster*, the twenty-eighth day of *May* in the
" eighth year of our reign. *Hale.* Essoin for the bishop ad-
" journed until three weeks from the day of Saint *Michael;*
" the same day for the clerk of essoin for the clerk ad-
" journed until the morrow of Saint *Martin;* the same day
" for the bishop *William Hall.* Pledges of prosecuting,
" *John Doe* and *Richard Roe;* summoners, *Thomas Eyre*, *Jo-*
" *seph Russel*, *Edward Somner*, Esq. sheriff; which said writ
" of *certiorari*, together with the return thereof, is affiled
" amongst the records without day of that term: And upon
" this the said *William Phillips*, by *Joseph Sherwood* his at-
" torney, likewise comes forthwith here in court: And
" thereupon the said bishop and *John Berrow* (as before) say,
" that in the record and proceedings aforesaid, and also
" in the giving of the judgment aforesaid, there is mani-
" fest error, alleging the errors aforesaid by them in form
" aforesaid above alleged, and pray that the judgment [767]
" aforesaid, for the aforesaid and other errors being in
" the record and proceedings aforesaid, may be reversed,
" annulled, and altogether deemed as none; and that they
" be restored to all things which by occasion of the judg-
" ment aforesaid they have lost; and that the Court of
" the said lord the king now here proceed to the examina-
" tion as well of the record and proceedings aforesaid, as
" of the said matters above assigned for error, and that the
" said *William* do rejoin to the errors aforesaid: Upon
" which the same *William Phillips* saith, that there is no
" error either in the record and proceedings aforesaid, or
" in the giving of the judgment: And in like manner — Judgment affirmed.
" prayeth that the Court of the said lord the king now
" here do proceed to the examination as well of the re-

"cord and proceedings aforesaid, as of the said matters "above assigned for error; and that the said judgment in "all things be affirmed: But because the Court of the said "lord the king now here are not yet advised of giving their "judgment of and concerning the premises, day is there-"upon given to the parties aforesaid, before the lord the "king, until

wheresoever, &c. of "hearing their judgment thereupon, for that the Court of "the said lord the king now here thereof are not yet," &c.

Pleas before our Lady the Queen at Westminster, *of the Term of* St. Michael *in the Third Year of the Reign of our Lady* Anne, *now Queen of* England, &c. *Roll* 144.

GODDARD *against* SMITH AND ANOTHER.

Salk. 21. 6 Mod. 261. 3 Salk. 245. Rep. A. Q. 56. Holt 497. S. C.

Middlesex, to wit, "BE it remembered, That heretofore, that "is to say, in the term of the *Holy Trinity* "last past, before our lady the queen at *Westminster*, "came *Richard Goddard* by *Henry Wright* his attorney, and "brought into the Court of our said lady the queen then "there his certain bill against *Richard Smith*, and *Christo-"pher Preston* in the custody of the marshal, &c. of a "plea of trespass upon the case; and there are pledges "of prosecuting, namely, *John Doe* and *Richard Roe*; "which said bill followeth in these words, that is to say, "*Middlesex*, to wit, *Richard Goddard* complains of *Richard*

[768]

"*Smith* and *Christopher Preston* in the custody of the "marshal of the *Marshalsea* of our lady the queen, be-"fore the queen herself being, for that, to wit, That "whereas the said *Richard Goddard* is a good, true, faith-"ful, peaceable, and honest subject, and liege man of "our lady the now queen, and was of a good name, fame, "reputation, conversation, behaviour, and condition, "and as a good, true, faithful, peaceable, and honest "liege man and subject of the said lady the now queen, "being without any scandal, imputation, or reproach, "and hath not behaved or demeaned himself at any time "from the time of his nativity hitherto as a barretor or "disturber of the peace of the said lady the queen, nor "was in suspicion of the like crime amongst his neigh-

Declaration in case on conspiracy for a false and malicious indictment of barretry, whereof he was acquitted.

" bours and other subjects of the said lady the queen to " whom the said *Richard Goddard* was known, and by rea- " son of his honest and quiet conversation aforesaid for the " whole time aforesaid, lawfully and honestly gained and " acquired great credit and esteem, and also divers great " gains and profits from his neighbours and other subjects " of our said lady the queen, with whom the said *Richard* " *Goddard* had commerce for the support of himself and his " family: Nevertheless the said *Richard Smith* and *Christo-* " *pher*, not ignorant of the premises, but contriving and " maliciously intending not only to deprive him the said " *Richard Goddard* of his good name, fame and esteem " aforesaid, but also to bring him the said *Richard God-* " *dard* into ignominy and public disgrace, that by reason " thereof the subjects of the said lady the queen might " withdraw themselves from the fellowship of him the said " *Richard Goddard*, and might altogether cease and de- " sist from dealing and having commerce with him in any " manner, on the thirteenth day of *September* in the first " year of the reign of the said lady *Anne*, now queen of " *England*, &c. at the parish of St. *James Clerkenwell* in " the county aforesaid, then and there having had a con- " spiracy between themselves falsely and maliciously to " cause the said *Richard Goddard* to be indicted as a bar- " retor and public disturber of the peace of the said lady " the queen, without any cause or colour of such crime be- " ing committed by him the said *Richard Goddard*, they " the same *R. Smith* and *Christopher* at the parish afore- " said in the county aforesaid, in prosecution and execu- " tion of their malicious intention and conspiracy afore- " said, at the general quarter sessions of the peace of our " lady the queen held for the county of *Middlesex* at *Hicks's* " *Hall* in St. *John-Street* in the county aforesaid, before " *John Bennet, Henry Hawley*, and *Joseph Offley*, Esquires, " and other their fellow justices of the said lady the queen, " appointed to keep the peace in the county aforesaid, " and also to hear and determine divers felonies, tres- " passes, contempts, and misdemeanors in the same coun- " ty committed, falsely and maliciously caused and pro- " cured the said *Richard Goddard*, with intent to defame " the same *Richard Goddard*, without any lawful or true " cause, to be indicted by the name of *Richard Goddard*, " late of the parish of St. *James Clerkenwell* in the county " of *Middlesex*, yeoman, for that the same *Richard God-* " *dard*, on the first day of *January* in the first year " abovesaid, and divers other days and times as well " before as afterwards, at the parish aforesaid in the " county aforesaid, had been and then was a common

Indictment at Hicks's Hall.

[769]

" barretor, and a common, daily, and public disturber of " the peace of the said lady the now queen, and also a " common and turbulent slanderer and sower of quarrels " and discords amongst his quiet and honest neighbours, " so that he moved, procured, and stirred up divers con- " tentions and controversies, and also brawlings, quarrels, and fights, at the parish aforesaid in the county afore- " said, and elsewhere in the said county of *Middlesex*, " amongst divers liege subjects of the said lady the queen, " to the great disturbance of the peace of the said lady " the now queen, to the evil example of all others in the " like case offending, and against the peace of the said la- " dy the now queen, her crown and dignity, *&c.* and did " falsely and maliciously prosecute and cause to be prose- " cuted the said indictment against the said *Richard God-* " *dard*, until the said lady the now queen caused that in- " dictment afterwards for certain reasons to come to be de- " termined before her: And the sheriff of the county afore- " said was commanded that he should not omit, *&c.* but " cause him to come and answer, *&c.* And he the said " *Richard Goddard* afterwards, to wit, in the term of St. " *Michael* in the second year of the reign of the said lady " the now queen, in the Court of our lady the queen, be- " fore the queen herself, the same Court being at *West-* " *minster*, was according to the law and custom of this king- " dom of *England* in a due and lawful manner thereof dis- " charged. By pretence of which said premises against " him the said *Richard Goddard*, by the said *Richard Smith* and " *Christopher Preston* in form aforesaid published, done, ex- " hibited, and prosecuted, the same *Richard Goddard* is not " only very much hurt and injured in his good name, fame, " credit, and reputation aforesaid, and disquieted and " weakened in his body, but was also forced to expend and " lay out divers large sums of money in and about acquit- ting and discharging himself of the said indictment, and " defending his innocence, to the very great discredit and " extreme impoverishment of him the said *Richard God-* " *dard*, and to the damage of the said *Richard Goddard* of " twenty pounds: And thereupon he brings suit, *&c.*

Removed by Certiorari.

Discharged.

" And now at this day, to wit, *Monday* next after three " weeks from the day of St. *Michael* in this same term, " till which day the said *Richard Smith* and *Christo-* " *pher* had leave to imparle to the said bill, and then to " answer, *&c.* before our lady the queen at *Westminster* " comes as well the said *Richard* by his said attorney, as " the said *Richard Smith* and *Christopher* by *Edmund But-* " *ler* their attorney: And the said *Richard* and *Chris-* " *topher* defend the force and injury, when, *&c.* and say

"that they are in no manner guilty of the premises above "laid to their charge, as the said *Richard Goddard* above "complains against them: And of this they put themselves upon the country; and the said *Richard Goddard* "likewise, *&c.* Therefore let a jury come thereupon before our lady the queen at *Westminster*, on *Monday* next "after the morrow of *All Souls*, and who neither, *&c.* to "recognize, *&c.* because as well, *&c.* The same day is "given to the parties aforesaid there," *&c.*

Pleas before our Lady the Queen at Westminster, *of the Term of the* Holy Trinity *in the Third Year of the Reign of our Lady* Anne, *now Queen of* England, *&c.* *Roll* 211.

TENANT *against* GOULDWIN.

[3 Ld. Raym. Entries 485. S. C.]

Middlesex, to wit, "BE it remembered, That heretofore, that "is to say, in the term of *Easter* last past, "before our lady the queen at *Westminster*, came *Robert* "*Tenant* by *John Rice* his attorney, and brought into the "court of our said lady the queen then there his certain "bill against *Luke Gouldwin*, in custody of the marshal, "*&c.*, of a plea of trespass upon the case; and there are "pledges of prosecuting, namely, *John Doe* and *Richard* "*Roe;* which said bill followeth in these words, that is "to say, *Middlesex*, to wit, *Robert Tenant* complains of "*Luke Gouldwin* in the custody of the marshal of the "*Marshalsea* of our Lady the queen, before the queen her-"self being, for that, to wit, That whereas he the said "*Robert*, on the first day of *October* in the first year of "our lady *Anne*, now queen of *England*, *&c.*, and from "thence always hitherto was possessed and still is pos-"sessed of one messuage, situate, lying, and being in *Frith-*"*street*, in the parish of St. *Anne* within the liberty of "*Westminster* in the said county of *Middlesex*, for a cer-"tain term of years not yet ended, and used to lay and "keep in his cellar, parcel of his messuage aforesaid, good "stores of coals and ale for the use of his family, and also "to be sold and merchandised to divers persons who "were wont to buy that commodity in his messuage "aforesaid, to the great profit and advantage of him the

Salk. 21, 360
6 Mod. 311.
Holt 500 S. C.

Case for not repairing a partition wall, whereby the plaintiff was prejudiced.

"said *Robert*, which said cellar lies contiguous, and for "all the time aforesaid did lie contiguous to a messuage "of the said *Luke* in the parish aforesaid, and used to be "separated and fenced from a privy-house, parcel of the "aforesaid messuage of the said *Luke*, by a thick and close "wall which belongeth to the said messuage of the said "*Luke*, and of right ought to have been repaired by the "said *Luke* for the whole time aforesaid: Nevertheless "the said *Luke* not being ignorant of the premises, but "contriving and fraudulently intending him the said *Robert* in this behalf unjustly to aggrieve, and wholly to "deprive him the said *Robert* of the use and advantage of "the cellar of his messuage aforesaid, and to hinder him "of the profit of his commerce aforesaid, on the same "first day of *October* in the above said year of the reign of "the said lady the queen, and from thence always hitherto, "so negligently kept and repaired the said wall, although "often requested to repair the same, to wit, by the said "*Robert*, on the same first day of *October* in the parish "aforesaid, that for want of due care and reparation of "the same wall, the filthinesses and nasty things of the "said privy-house flowed out of the same privy house by "the decayed parts and breaches of the wall aforesaid into "the cellar aforesaid of the same *Robert*, and overflowed "the same cellar, to wit, in the parish aforesaid, for the "whole time aforesaid; whereby the same *Robert* lost the "use of his cellar, and the profit of his commerce aforesaid, for all the time aforesaid: Wherefore the same "*Robert* saith, that he is injured and hath damage to the "value of one hundred pounds: And thereupon he brings "suit, &c. And now at this day, to wit, *Friday* next "after the morrow of the *Holy Trinity* in this same term, "until which day the said *Luke* had leave to imparle to "the said bill, and then to answer, &c. before our lady "the queen at *Westminster* comes the aforesaid *Robert* by "his said attorney, and prays that the said *Luke* may answer to the declaration: And the said *Luke*, although "on the same day solemnly required, doth not come nor "say any thing in bar or preclusion of the aforesaid action "of the said *Robert*; whereby the same *Robert* remains "against him thereupon undefended; for which reason "the said *Robert* ought to recover his damages against the "said *Luke*: But because it is not known by the Court of "the said lady the queen now here before the queen herself, what damages the said *Robert* hath sustained by "occasion of the premises in this behalf: Therefore the "sheriff is commanded, that he, by the oath of twelve "honest and legal men of his bailiwick, do diligently "inquire what damages the said *Robert* hath sustained, as

[771]
Averment of the usage.

Breach

Plaintiff damnified

Judgment by nil dicit.

" well by occasion of the premises, as far as his costs and " charges by him about his suit in this behalf applied; and " that he send the inquisition which he shall take thereon " to our lady the queen at *Westminster* on *Monday* next " after three weeks from the day of *St. Michael*, under his " seal and the seals of those by the oath of whom he shall " take the said inquisition, together with the writ of our " lady the queen to him for that purpose directed: The " same day is given to the said *Robert* there," &c.

Pleas before our Lady the Queen at Westminster, *of the Term of* St. Hilary *in the Third Year of the Reign of our Lady* Anne, *now Queen of* England, *&c. Roll* 102. [772]

BROOK *against* HUSTLER.

England, to wit, " OUR lady the queen hath sent to her " trusty and well-beloved Sir *Thomas Trevor*, " Knt., her Chief Justice of the Bench, her writ closed in " these words, to wit, *Anne*, by the grace of GOD, of " *England*, *Scotland*, *France*, and *Ireland* Queen, Defender " of the Faith, &c. To her trusty and well-beloved Sir " *Thomas Trevor*, Knt., her Chief Justice of the Bench, " greeting: For as much as in the record and proceed- " ings, and also in the giving of judgment of the plaint " which was in our court before you and your brethren, " our justices of the Bench, by our writ between Sir " *William Hustler*, Sir *Richard Osbaldeston*, Knts., and " *William Osbaldeston*, Esq., *Thomas Brook* late of *Over-* " *flocton* in the county of *York*, yeoman, of a debt of se- " venty and nine shillings and eleven pence, which the " same *William*, *Richard*, and *William* demand of the said " *Thomas*, as it is said, manifest error hath intervened, to " the great damage of the same *Thomas*, as we are in- " formed by his complaint; We willing that the error, " if any was, be duly amended, and that full and speedy " justice be done to the parties aforesaid in this behalf, do " command you, that if judgment be thereupon given, " then you send to us distinctly and plainly, under your " seal, the record and proceedings aforesaid, with all " things touching the same, and this writ; so that we may " have them from the day of *Easter* in fifteen days where- " soever we shall then be in *England*, that we having in-

Salk. 56. Rep. A. Q. 76. S. C.

"spected the record and proceedings aforesaid, may cause "further to be done thereupon for amending the said error, "that which of right and according to the law and custom "of our kingdom of *England* shall be meet to be done. "Witness ourself at *Westminster* the second day of *March* "in the second year of our reign.

Hungerford.

"The answer of Sir *Thomas Trevor*, Knt., Chief Jus-"tice within-named. The record and proceedings of the "plaint within mentioned, with all things touching the "same, I send before our lady the queen, wheresoever, &c., "at the day within contained in a certain record to this "writ annexed, as I am within commanded.

Thomas Trevor.

[773] "Pleas inrolled at *Westminster* before Sir *Thomas Trevor*, "Knt., and his fellow-justices of our lady the queen of "the Common Bench, of the term of St. *Hilary* in the "second year of the reign of our lady *Anne*, by the grace "of GOD, of *England*, *Scotland*, *France*, and *Ireland* "Queen, Defender of the Faith, &c. *Roll* 1228.

Declaration for an amerciament in a court-leet. Seisin of King James I. in a court-leet.

"*Yorkshire*, to wit, *Thomas Brook*, late of *Overflocton* in "the county aforesaid, yeoman, was summoned to answer "Sir *William Hustler*, Knt., Sir *Richard Osbaldeston*, Knt., "and *William Osbaldeston*, Esq., of a plea that he render "to them seventy and nine shillings and eleven pence, "which he owes to them and unjustly detains, &c. And "whereupon the same Sir *William Hustler*, Sir *Richard* "and *William Osbaldeston*, by *Robert Hopkinson* their at-"torney, say, that our lord *James* the First, late King of "*England*, was seised in right of his crown of *England* as "of fee and right of and in the court-leet and view of "frank-pledge with the appurtenances, and all and every "thing which to a court-leet or view of frank-pledge be-"longed, or in any manner appertained, or ought to be-"long or appertain, within the manors or lordships, vil-"lages or hamlets of *West Bretton*, *Cawthorn*, *Overflocton*, "and *Netherflocton*, in the said county of *York*, and within "the precincts of the same manors or lordships, villages "and hamlets, and every of them, in the said county of "*York*, being or not being parcel to the duchy of *Lan-*"*caster*, of all resident and inhabiting within the manor "or lordship, village and hamlet beforesaid, and within "the precincts of the same manors or lordships, villages "and hamlets, and every or any of them. The said "court-leet and view of frank-pledge aforesaid to be "holden twice by the year within the manors or lord-"ships, villages and hamlets aforesaid, or any of them, "or within the precincts of the same manors or lord-

" ships, villages and hamlets, or any of them, at such days " and times in a year as the said lord the king *James* the " First, his heirs or assigns, should see fit, convenient, and " necessary, according to the law and custom of this king-" dom of *England*, before the steward of the same lord the " king of that court, or the deputy of such steward for the " time being: And being so seised, the late King *James* the " First afterwards, by his letters patent under the Great " Seal of *England*, and under the seal of the duchy of *Lan-" caster* in like manner made, bearing date at *Westminster* " in the county of *Middlesex* on the twenty-ninth day of *June* " in the thirteenth year of his reign in *England*, and the " forty-eighth in *Scotland*, which the said Sir *William* " *Hustler*, Sir *Richard* and *William Osbaldeston* here in " court produce, as well for and in consideration of the sum " of twenty shillings of lawful money of *England*, well and " truly to be paid at the receipt of his Exchequer at *West-" minster* to his own use, by his beloved subject *George* " *Wentworth* of *Bulkliffe* in *West Bretton* in the county of " *York*, Gent., whereof the same late lord the king did ac-" knowledge himself to be fully satisfied and paid, as for " divers other good causes and considerations the same " lord the king especially moving, of his especial grace and " certain knowledge and mere motion did give and grant " for himself, his heirs and successors, to the said *George* " *Wentworth*, his heirs and assigns for ever, that they should " and might have, hold, and enjoy within the manors or " lordships, villages, or the hamlets of *West Bretton*, *Caw-" thorn*, *Overflocton*, and *Netherflocton*, and every of them, in " the said county of *York*, and within the precincts of the " same manors or lordships, villages and hamlets, and eve-" ry of them, in the said county of *York*, being or not being " parcel of the said duchy of *Lancaster* a court-leet and " view of frank-pledge, to be held of all the residents and " inhabitants, and other residents coming within the lord-" ships or manors, villages and hamlets aforesaid, and with-" in the precincts of the same manors or lordships, villages " and hamlets, and every or any of them; to hold the " said court-leet and view of frank-pledge twice by the " year from time to time within the manors or lordships, " villages and hamlets aforesaid, or any of them, or within " the precincts of the same manors or lordships, villages " and hamlets, or any of them, at the same places, days, " and times at which the said *George Wentworth*, his heirs " or assigns, should see fit, convenient, and necessary, ac-" cording to the law and custom of this kingdom of *Eng-" land*, before the steward of the same *G. Wentworth*, his " heirs and assigns for the time being, or before the de-

Grant thereof to Wentworth by letters patent under the duchy seal.

[774]

To be held twice a year at such days as the grantee should think fit.

"puty of such steward for the time being; and all and "whatsoever to the said court-leet or view of frank-pledge "belonged, or in anywise appertained, or in any manner "ought to belong or appertain, and also all and singular "amerciaments, fines, forfeitures, pains, penalties, perqui- "sites, profits, liberties, pre-eminences, privileges, rights, "and jurisdictions whatsoever, which at the said courts- "leet or view of frank-pledge to the said lord the king, or "his successors, in any manner whatsoever might or ought "to belong; by virtue of which said letters patent the "said *George Wentworth* was seised as of fee and right of "and in the court-leet and view of frank-pledge aforesaid, "with the appurtenances; and held divers courts and "views of frank-pledge within the manors or lordships, "villages or hamlets of *West Bretton*, *Cawthorn*, *Overflocton*, "and *Netherflocton* aforesaid, according to the gift and grant "aforesaid in the letters patent contained: And the said "*George* being so seised of court-leet and view of frank- "pledge aforesaid, with the appurtenances, afterwards, to "wit, on the second day of *June* in the year of our Lord one "thousand six hundred and thirty-eight, at *Netherflocton* "aforesaid died, after whose death the said court-leet and "view of frank-pledge, with the appurtenances, did de- "scend to *William Wentworth*, Gent., as son and heir of the "said *George*, whereby the said *William Wentworth*, son and "heir of the said *George*, was seised as of fee and right of* "and in the court-leet and view of frank-pledge aforesaid, "with the appurtenances; and being so seised thereof, the "same *William* afterwards, to wit, on the fourth day of "*March* in the year of our Lord one thousand six hundred "and thirty-nine, at *Netherflocton* aforesaid, died without "any issue of his body; after whose death the said court- "leet and view of frank-pledge, with the appurtenances, "descended to *Thomas Wentworth*, Esq., afterwards Sir "*Thomas Wentworth*, Baronet, as brother and heir of the "said *William Wentworth*, whereby the said *Thomas Went-* "*worth*, as brother and heir of the said *William Went-* "*worth*, was seised of and in the court-leet and view of "frank-pledge aforesaid, with the appurtenances as of fee "and right; and being so seised thereof, the said Sir *Tho-* "*mas* afterwards, to wit, on the first day of *April*, in the "year of our Lord one thousand six hundred and seventy- "six, at *Netherflocton* aforesaid died, without any issue of "his body issuing; after whose death the said court-leet "and view of frank-pledge, with the appurtenances, did "descend to Sir *Matthew Wentworth*, Baronet, as bro- "ther and heir of the said Sir *Thomas Wentworth*, where- "by the said *Matthew*, as brother and heir of the said Sir

Grantee seised and held several courts, and died.

Discent to his son and heir who was seised.

And died without issue, whereby they descended to his brother.

[* 775]

Who died also without issue, whereby they descended to his brother.

"*Thomas Wentworth*, was seised of and in the court-leet "and view of frank-pledge aforesaid, with the appurtenan- "ces, as of fee and right; and being so seised thereof, the "same Sir *Matthew* afterwards, to wit, on the second day "of *August* in the year of our Lord one thousand six hun- "dred and seventy-eight, at *Netherflocton* aforesaid died; "after whose death the said court-leet and view of frank- "pledge with the appurtenances descended to Sir *Matthew* "*Wentworth*, Baronet, as son and heir of the said Sir *Mat-* "*thew Wentworth* the brother, whereby the said Sir *Mat-* "*thew Wentworth* the son was seised of and in the court-leet "and view of frank-pledge aforesaid, with the appurte- "nances, as of fee and right: And the said Sir *Matthew* the "son being so seised thereof, afterwards, to wit, on the "eighth day of *December* in the year of our Lord one thou- "sand six hundred and ninety-three, at *Netherflocton* afore- "said, by a certain indenture of bargain and sale made "between the said Sir *Matthew Wentworth* the son, of the "one part, and the said Sir *William Hustler*, Sir *Richard* "*Osbaldeston*, and *William Osbaldeston*, of the other part, the "other part whereof sealed with the seal of him the said "Sir *Matthew* the son, the same Sir *William*, Sir *Richard* "and *William Osbaldeston*, produce here in court, the date "of which is the same day and year, in consideration of "five shillings to him in hand paid by the said Sir *William*, "Sir *Richard* and *William Osbaldeston*, bargained and sold "to them the said Sir *William*, Sir *Richard* and *William*, "the said court-leet and view of frank-pledge with the ap- "purtenances, to have and to hold to the same Sir *William* "*Hustler*, Sir *Richard* and *William Osbaldeston*, their exe- "cutors, administrators, and assigns, from the day of the "date of the said indenture to the end and term of one "year then next following, and fully to be complete and "ended: By virtue of which said bargain and sale, and "by force of the statute in that behalf made and provided "of transferring uses into possession, the same Sir *William* "*Hustler*, Sir *Richard* and *William Osbaldeston*, were in pos- "session of the court-leet and view of frank-pledge afore- "said for that term; and being thereof so possessed, and "the said Sir *Matthew Wentworth* the son being seised of "the reversion of the court-leet and view of frank-pledge "aforesaid, with the appurtenances, as of fee and right, af- "terwards, to wit, on the ninth day of *December*, in the year "of our Lord one thousand six hundred and ninety-three "abovesaid, at *Netherflocton* aforesaid, by a certain other "indenture made between him the said Sir *Matthew Went-* "*worth* the son, of the one part, and the said Sir *Wil-* "*liam Hustler*, Sir *Richard Osbaldeston*, and *William*

After whose death they descended to his son, who entered.

And by lease and release conveyed to the plaintiffs.

[776]

" *Osbaldeston*, of the other part, the other part whereof
" sealed with the seal of the said Sir *Matthew* the son, the
" same Sir *William Hustler*, Sir *Richard* and *William Os-*
" *baldeston* produce here in court, the date whereof is the
" same day and year last above mentioned, he the said Sir
" *Matthew Wentworth* the son, released to the same *William*
" *Hustler*, Sir *Richard* and *William Osbaldeston*, their heirs
" and assigns, all the estate, right, title, and interest of him
" the said Sir *Matthew Wentworth* the son, of and in the
" court-leet and view of frank-pledge aforesaid, with the ap-

Plaintiffs seised.

" purtenances: By virtue of which premises the said Sir
" *William Hustler*, Sir *Richard* and *William Osbaldeston*
" were and still are seised of and in the court-leet and view

Defendant an inhabitant within the jurisdiction of the leet, and owed suit.

" of frank-pledge aforesaid, with the appurtenances, as of
" fee and right; and that *Thomas Brooke*, on the twenty-
" fourth day of *April* in the year of our Lord one thousand
" seven hundred and three, and long before, was resident
" and an inhabitant at *Overflocton* aforesaid, within the ju-
" risdiction of the leet and view of frank-pledge, aforesaid,
" and ought to do suit at the court of view of frank-pledge
" aforesaid: And they the said Sir *William Hustler*, Sir
" *Richard* and *William Osbaldeston*, being so as aforesaid
" seised of the court-leet and view of frank-pledge afore-
" said, with the appurtenances, the court-leet and view of

Court held April 27, 1703.

" frank pledge aforesaid was held at *Netherflocton* aforesaid
" within the manors and lordships aforesaid the said twen-
" ty-fourth day of *April* in the year of our lord one thousand
" seven hundred and three, before *Richard Witton*, Esq.,
" steward of the said Sir *William Hustler*, Sir *Richard* and
" *William Osbaldeston*, of that court, of which court so to

Notice was given to the inhabitants.

" be held due notice was given to the residents and inhab-
" itants within the manors, lordships, villages, and hamlets
" aforesaid, to wit, at *Netherflocton* aforesaid; and that the

Defendant made default in not appearing, wherefore the jury presented him.

" said *Thomas Brooke* did not do his suit nor appear at
" that court, but made default; wherefore at the same
" court, by the jurors who were sworn and charged in
" the same court to inquire and present those things
" which appertained to the said court-leet and view of
" frank-pledge, it was presented upon their oath, that the
" said *Thomas Brooke* then was resident and an inhabitant

[777]

" within the manors aforesaid, and within the jurisdic-
" tion of the court of view of frank-pledge aforesaid, and
" ought to have done suit to the court of view of frank-
" pledge aforesaid: And that the said *Thomas Brooke*, al-
" though he was then solemnly summoned, did not appear
" but made default, by reason whereof the same *Thomas*

And he was amerced by the Court and affeer-

" *Brooke* was then and there by the same Court amerced,
" which said amercement, by *Joseph Senior* and *Timothy*

" *Roads* then residents and inhabitants within the manors " aforesaid, then and there chosen and sworn affeerors by " the same Court, was then in due manner affeered to " thirty-nine shillings and eleven pence of lawful money " of *England*; whereof the said *Thomas Brooke* after- " wards, to wit, the day and year last mentioned, at *Ne-* " *therflocton* aforesaid, had notice, whereby an action ac- " crued to the same Sir *William Hustler*, Sir *Richard* and " *William Osbaldeston*, to demand and have of the said " *Thomas Brooke* the said thirty-nine shillings and eleven " pence parcel of the aforesaid seventy-nine shillings and " eleven pence. And whereas also the said *Thomas Brooke* " afterwards, to wit, on the first day of *July* in the year " of our Lord one thousand seven hundred and three, at " *Netherflocton* aforesaid, borrowed of the said Sir *William* " *Hustler*, Sir *Richard* and *William Osbaldeston*, forty shil- " lings, residue of the aforcaid seventy-nine shillings and " eleven pence, to be paid to the said Sir *William Hustler*, " Sir *Richard* and *William Osbaldeston*, when he should be " thereunto required: Nevertheless the said *Thomas* " *Brooke*, although often requested, hath not yet paid the " aforesaid seventy-nine shillings and eleven pence, nor " any part thereof, to the same Sir *William Hustler*, Sir " *Richard* and *William Osbaldeston*, or either of them, but " hath hitherto refused and still refuses to pay the same to " them or any of them; wherefore they say that they are " injured and have damage to the value of one hundred " shillings: And thereupon they bring suit, *&c.*

ed by two affeerors, chosen and sworn, at 19 s. 11 d., of which he had notice. By which their action accrued to the plaintiffs.

Mutuatus for 40 shillings.

" And the aforesaid *Thomas Brooke*, by *Henry Wood* his " attorney, comes and defends the force and injury when, " *&c.*, and says nothing in bar or preclusion of the said " action of the said Sir *William Hustler*, Sir *Richard* and " *William Osbaldeston*: Whereupon the same Sir *William* " *Hustler*, Sir *Richard* and *William Osbaldeston*, remain " against the said *Thomas Brooke* thereupon undefended: " Therefore it is considered that the said Sir *William* " *Hustler*, Sir *Richard* and *William Osbaldeston*, do recover " against the said *Thomas Brooke* their said debt, and their " damages by occasion of the detention of that debt to " eight pounds, by the Court here adjudged to the same " Sir *William Hustler*, Sir *Richard* and *William Osbaldeston*, " by their assent; and the same *Thomas Brooke*, in mercy, " *&c.*

Nil dicit.

Judgment.

" Afterwards, that is to say, on *Tuesday* next after eight " days from the day of St. *Hilary* in the same term, before " the lady the queen at *Westminster* comes the aforesaid " *Thomas Brooke* by *Thomas Harvey* his attorney, and saith, " that in the record and proceedings aforesaid, and also " in giving of the judgment aforesaid, there is manifest

Errors assigned.

[778]

"error, in this, to wit, that the declaration aforesaid in "the record aforesaid mentioned, and upon which the "judgment aforesaid in form aforesaid is given, and the "matter in the same contained, are not sufficient in law "to have or maintain that judgment thereupon given in "form aforesaid; and so the said judgment thereupon in "form aforesaid given is erroneous and void in law; and "therefore in that there is manifest error. There is error "also in this, that where it appears by the said record, "that the said judgment in form aforesaid given, was "given for the said Sir *William Hustler*, Knight, Sir *Richard Osbaldeston*, Knight, and *William Osbaldeston*, against "him the said *Thomas Brooke;* whereas by the law of the "land of this kingdom of *England*, judgment in the plea "aforesaid ought to have been given for the said *Thomas Brooke* against them the said Sir *William Hustler*, Sir "*Richard Osbaldeston*, and *William Osbaldeston;* and there-"fore in that there is manifest error: And he prays, that "the said judgment for the errors aforesaid, and others "being in the record and proceedings aforesaid, be "revoked, annulled, and altogether be deemed as none; "and that the same *Thomas Brooke* be restored to all "things, which by occasion of the judgment aforesaid he "hath lost; and that the said Sir *William Hustler*, Knight, "Sir *Richard Osbaldeston*, Knight, and *William Osbaldeston*, "may rejoin to the errors aforesaid, *&c.* And the said "Sir *William Hustler*, Knight, Sir *Richard Osbaldeston*, "Knight, and *William Osbaldeston*, by *Adrian Moore* their "attorney, come and forthwith say, that there is not any "error either in the record and proceedings aforesaid, or "in the giving the judgment aforesaid; and pray that the "Court of the lady the queen now here may proceed to "the examination as well of the record and proceedings "aforesaid, as of the matters aforesaid by him the said "*Thomas Brooke* above assigned for errors, and that the "judgment aforesaid be in all things affirmed."

Joinder in error.

Judgment affirmed.

Pleas before the Lord the King and the Lady the Queen at Westminster, *of the Term of the* Holy Trinity *in the Third Year of the Reign of our Lord* William *and Lady* Mary, *now King and Queen of* England, *&c. Roll* 166.

BARKER *against* WINCH.

Berkshire, to wit, " SIMON Winch late of *Bray* in the county " aforesaid, Gent., was attached to answer " *Thomas Barker*, Gentleman, of a plea, wherefore with " force and arms he entered into six messuages, six cot- " tages, sixty acres of land, sixty acres of meadow, three " hundred acres of pasture, and forty acres of wood, with " the appurtenances, in the parish of *Bray*, which *William* " *Yieldall* and *Rebecca* his wife demised to the said *Tho-* " *mas* for a term which is not yet past; and into other " six messuages, six other cottages, six other acres of " land, sixty other acres of meadow, three hundred other " acres of pasture, and forty other acres of wood, with " the appurtenances, in the parish of *Bray* aforesaid, " which *John Lidgold* the younger also demised to the " said *Thomas Barker* for a term which is not yet past, " and him from his farms aforesaid ejected, and other " enormities to him did, to the great damage of the said " *Thomas*, and against the peace of our lord the king and " our lady the queen now, *&c.* And whereupon the " same *Thomas Barker*, by *William Turbill* his attorney, " complains, that whereas the said *William Yieldall* and " *Rebecca* his wife, on the first day of *April* in the third " year of the reign of our lord and lady now king and " queen of *England*, *&c.*, at the parish of *Bray*, demised " to the same *Thomas* the aforesaid six messuages, six cot- " tages, sixty acres of land, sixty acres of meadow, three " hundred acres of pasture, and forty acres of wood, with " the appurtenances, to have and to occupy the said te- " nements with the appurtenances, to the same *Thomas* " *Barker* and his assigns, from the twenty-fifth day of " *March* then last past to the full end and term of five " years from thence next following, fully to be complete " and ended; by virtue of which said demise the same " *Thomas Barker* entered into the said tenements with the " appurtenances last abovesaid, and was possessed thereof: " And also that whereas the said *John Lidgold*, on the

Salk. 56. Comb. 186. 3 Salk. 34. Cases B. R. 13. S. C. Ejectment in B. R. by original upon two several demises.

Second demise.

"same first day of *April*, in the third year abovesaid, at "the parish of *Bray* aforesaid, demised to the same *Thomas Barker* the aforesaid six other messuages, six other "cottages, sixty other acres of land, sixty other acres of
[780] "meadow, three hundred other acres of pasture, and forty "other acres of wood with the appurtenances, to have "and to occupy the same tenements with the appurtenances to the said *Thomas* and his assigns, from the aforesaid twenty-fifth day of *March* then last past unto the "full end and term of five years from thence next following, and fully to be complete and ended; by virtue of "which demise the said *Thomas* entered into the said tenements with the appurtenances last above mentioned, "and was possessed thereof; and being so possessed thereof, and being also possessed of the said several tenements "with the appurtenances as aforesaid, the said *Simon Winch* afterwards, to wit, on the said first day of *April* "in the third year abovesaid, with force and arms, *&c.* "entered into the aforesaid tenements with the appurtenances, which the said *William* and *Rebecca* his wife had "demised to the said *Thomas Barker* in form aforesaid, for "the said term first above specified which is not yet past, "and into the aforesaid tenements with the appurtenances "which the said *John Lidgold* had demised to the same "*Thomas Barker* in form aforesaid, for the said term last "above specified, which is not yet past, and him the said "*Thomas Barker* from his farms aforesaid ejected, and "other enormities, *&c.*, to the great damages, *&c.*, and "against the peace, *&c.* Wherefore he saith that he is "injured, and hath damage to the value of one hundred "pounds: And thereupon he brings suit, *&c.* And the "aforesaid *Simon Winch* by *John Sandwell* his attorney, "comes and says, that the tenements in the declaration "aforesaid above specified are, and from the time of "which the memory of man is not to the contrary, were "parcel of the manor of *Bray* in the county aforesaid, of "which said manor our lord the king and our lady the "queen are seised in right of their crown, and that the "manor aforesaid is of the ancient demesne of the crown "of our lord the king and our lady the queen; and that "the aforesaid tenements are pleadable, and have been "pleaded in the court of the manor aforesaid, by writ of "right close of our lord the king and our lady the queen, "from the time of which the memory of man is not to the "contrary; and this he is ready to verify as the Court "shall consider, *&c.* Wherefore he prays judgment if the "Court of the lord the king and the lady the queen here "will take conusance of plea thereupon, *&c.*

Pleads in abatement that the lands are parcel of a manor in ancient demesne.

And only impleadable in the court of the manor by writ of right close.

" And the aforesaid *Thomas Barker* saith, that notwithstanding any matters by the said *Simon Winch* above in his plea alleged, the Court of our lord the king and lady the queen here ought not to be precluded from having cognizance of the plea aforesaid; because he saith that the plea aforesaid by him the said *Simon* in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in the law to preclude the said Court of our lord the king and lady the queen now here from having cognizance of the plea aforesaid, to which said plea and the matter in the same contained the said *Thomas Barker* need not, neither by the law of the land is he bound, in any manner to answer: And this he is ready to verify: Wherefore for want of a sufficient answer in this behalf, the said *Thomas* prays judgment and his term aforesaid yet to come of and in the tenements aforesaid with the appurtenances, together with his damages by occasion of the trespass and ejectment aforesaid, to be to him adjudged, *&c.* And for causes of demurrer in law upon that plea, he the said *Thomas*, according to the form of the statute in such case thereupon lately made and provided, shews and demonstrates to the Court here these causes following, to wit, For that the said *Simon* in his said plea hath not shewn to the Court here, nor hath alleged, that the tenements aforesaid, with the appurtenances in the said declaration mentioned, nor any parcel thereof, are held of the lord and lady the now king and queen of their manor of *Bray* aforesaid; and because the plea aforesaid is insensible, uncertain, and wants form.

Demurrer.

[781]

Special cause of demurrer.

" And the aforesaid *Simon* saith, that the plea aforesaid by him the said *Simon* in manner and form aforesaid above pleaded, and the matter in the same contained, are good and sufficient in the law, to preclude the said Court of the said lord the king and lady the queen now here from having cognizance of the plea aforesaid, which said plea and the matter in the same contained he the said *Simon* is ready to verify and prove as the Court, *&c.* And because the said *Thomas* hath not answered to that plea, nor hath hitherto in any manner contradicted it, he the said *Simon* as before prays judgment, if the Court of the said lord the king and lady the queen now here will or ought to take cognizance of the plea aforesaid: But because the Court of the said lord the king and lady the queen now here are not yet advised of giving their judgment of and concerning the premises, day is thereupon given to the said parties before the lord the king and lady the queen, until three weeks from the day of the *Holy Trinity*,

Joinder

Continuance.

"wheresoever, &c. of hearing their judgment therein, for "that the Court of our said lord the king and lady the "queen now here thereof is not yet, &c. At which day "before our lord the king and lady the queen at *Westminster* come the parties aforesaid by their attornies aforesaid: But because the Court of our said lord the king "and lady the queen now here are not yet advised of giving their judgment of and upon the premises, day is "therefore given to the parties aforesaid before the lord "the king and lady the queen, until on the morrow of "Souls, wheresoever, &c. of hearing their judgment thereupon, for that the Court of the said lord the king and "lady the queen now here is not yet thereof, &c. At "which day before the lord the king and lady the queen "at *Westminster* came the said parties by their said attornies: Whereupon all and singular the premises being "seen, and by the Court of the said lord the king and lady "the queen now here more fully understood, and mature

[782] "deliberation being thereon had, for as much as it appears "to the Court of our said lord the king and lady the queen "now here, that the said plea by the said *Simon* in manner "and form aforesaid above pleaded, and the matter in "the same contained, are not sufficient in law to preclude "the said Court of our said lord the king and lady the "queen now here from having conusance of the plea aforesaid; it is said by the Court to the said *Simon* that he "further answer to the declaration aforesaid; and upon this the said *Simon* being solemnly required, by the "said *John Sandwell* his attorney, comes and defends the "force and injury when, &c. and saith that he the said "*Simon* is in nowise guilty of the trespass and ejectment "aforesaid, as the said *Thomas* above against him complains: And of this he puts himself upon the country; "and the said *Thomas* in like manner, &c. Therefore "the sheriff is commanded that he cause to come before "our lord the king and lady the queen, in eight days of "the Purification of the blessed *Mary*, wheresoever, "&c. twelve, &c. by whom, &c. and who neither, &c. "to recognize, &c. Because as well, &c. The same "day is given to the parties aforesaid, here, &c. On "which day the jury aforesaid between the parties "aforesaid of the plea aforesaid is thereupon respited "between them, before the lord the king and the lady "the queen, until one month from the day of *Easter* from "thence next ensuing, wheresoever, &c. for defect of "jurors, &c. At which day before our lord the king "and lady the queen at *Westminster* came the said parties "by their said attornies, and the jurors of that jury being

Judgment that he answer over.

Not guilty.

Awarding a venire on a trial at bar, and continuance over for defect of jurors.

" likewise summoned came, who were elected, tried, and " sworn to speak the truth concerning the premises; and " as to the trespass and ejectment aforesaid of and in the " said six messuages, six cottages, sixty acres of land, sixty acres of meadow, three hundred acres of pasture, and " forty acres of wood, with the appurtenances, in the declaration aforesaid by the said *William Yieldall* and *Rebecca* his wife to the said *Thomas Barker* demised as aforesaid, upon their oath say, as to one fourth part of thirty-two acres of land thereof, with the appurtenances, held " of the manor of *Lords Lands*, and being in the tenure of one " *William Whitehand*, that the said *Simon Winch* is guilty of " the trespass and ejectment aforesaid, as the said *Thomas* " above against him complains; and as to the residue of " the said six messuages, six cottages, sixty acres of land, " sixty acres of meadow, three hundred acres of pasture, " and forty acres of wood, with the appurtenances, by " the said *William Yieldall* and *Rebecca* to the said *Thomas* demised as aforesaid, the same jurors upon their " oath aforesaid say, that the said *Simon* is not guilty of " the trespass and ejectment aforesaid, as the said *Simon* " hath above in his plea alleged; and as to the trespass " and ejectment aforesaid, of and in the said six other " messuages, six other cottages, sixty other acres of land, " sixty other acres of meadow, three hundred other acres " of pasture, and forty other acres of wood with the appurtenances, in the declaration aforesaid, by the said " *John Lidgold* the younger, to the said *Thomas Barker* " demised as aforesaid, the same jurors say upon their " oath aforesaid, as to one fourth part of thirty-two " acres of land held of the manor of *Lords Lands*, and " being in the tenure of the said *William Whitehand*, that " the said *Simon Winch* is guilty of the trespass and " ejectment aforesaid, as the said *Thomas* above complains " against him, and assesses the damages of him the said " *Thomas* by occasion of the premises aforesaid, besides " his costs and charges by him concerning his suit in this " behalf applied, to twenty shillings, and for those costs " and charges to thirty shillings: And as to the residue " of the said six other messuages, six other cottages, sixty " other acres of land, sixty other acres of meadow, three " hundred other acres of pasture, and forty other acres of " wood, with the appurtenances, in the declaration aforesaid, by the said *John Lidgold* demised as aforesaid, the " same jurors upon their said oath further say, that the " said *Simon Winch* is not guilty of the trespass and ejectment aforesaid, as the said *Simon* above in his plea hath " alleged: Therefore it is considered that the said *Thomas*

Verdict as to the first demise.

As to part for the plaintiff, and not guilty as to other part

And as to the second demise, find as part for the plaintiff, and part for the defendant.

[783]

Judgment as to what the defend-

ant is found guilty.

" *Barker* do recover against the said *Simon Winch* his said " term yet to come of and in the said fourth part of the " said thirty-two acres of land with the appurtenances " held of the manor of *Lords Lands*, and being in the " tenure of the said *William Whitehand*, parcel of the said " six messuages, six cottages, sixty acres of land, sixty " acres of meadow, three hundred acres of pasture, and " forty acres of wood, with the appurtenances by the said " *William Yieldall* and *Rebecca* his wife to the said *Thomas* " *Barker* demised as aforesaid, whereof it is above found " by the said jury, that the said *Simon* is guilty of the tres- " pass and ejectment aforesaid, and his said other term yet " to come of and in the said other fourth part of the said " thirty-two acres of land with the appurtenances, held of " the manor of *Lords Lands* aforesaid, in the tenure of the " said *William Whitehand*, parcel of the aforesaid six other " messuages, six other cottages, sixty other acres of mea- " dow, three hundred other acres of pasture, and forty " other acres of wood, with the appurtenances, by the said " *John Lidgold* the younger to the said *Thomas Barker* de- " mised as aforesaid; whereof it is likewise above found " by the jury aforesaid, that the said *Simon* is guilty of the " trespass and ejectment aforesaid, and his said damages " by the said jury in form aforesaid assessed; and also nine- " ty-nine pounds for his costs and charges aforesaid ad- " judged by the Court of the said lord the king and lady " the queen now here to the said *Thomas Barker*, by his " assent, of increase; which said damages in the whole

Capiatur.

" amount to one hundred and one pounds; and that the " said *Simon Winch* be taken, *&c.*, and likewise that the " said *Thomas Barker* be in mercy for his false complaint " against the said *Simon Winch*, for the residue of the

Acquittal, and without day as to the rest.

" trespass and ejectment aforesaid; whereof the said *Simon* " by the jury aforesaid in form aforesaid is acquitted, and " that the said *Simon* go thereupon without day," *&c.*

Pleas before our Lord the King at Westminster, *of the Term of the* Holy Trinity *in the Third Year of the Reign of our Lord* James *the Second, now King of* England, *&c. Roll* 1019.

COUNTESS OF PLYMOUTH *against* THROGMORTON AND HIS WIFE.

" THE lord the king hath given in charge to his trusty " and well-beloved Sir *Edward Herbert*, Knight, his Chief " Justice of the Common Bench, his writ closed in these " words, to wit, *James* the Second, by the Grace of GOD, " of *England*, *Scotland*, *France*, and *Ireland* King, Defender " of the Faith, *&c.* To his trusty and well-beloved Sir " *Edward Herbert*, Knt., his Chief Justice of the Common " Bench, greeting: Forasmuch as in the record and pro- " ceedings, and also in the giving the judgment of the " plaint which was in our Court before you and your " brethren our justices of the Common Bench, by our " writ, between *Thomas Throckmorton*, Esq. and *Dorothy* " his wife, executrix of the will of Sir *Edward Pick*, Knt. " and *Bridget* countess dowager of *Plymouth*, executrix of " the will of *Charles* earl of Plymouth, to the end that the " same *Bridget* countess dowager of *Plymouth*, should ren- " der to the said *Thomas* and *Dorothy* seventy-five pounds, " as it is said, manifest error hath intervened to the great " damage of her the said *Bridget* countess dowager of " *Plymouth*, as we are informed by her complaint; We " willing that the error, if any hath been, be in due man- " ner amended, and that full and speedy justice be done to " the said parties in this behalf, do command you, that if " judgment be thereupon given, then you send to us under " your seal distinctly and plainly the record and proceed- " ings aforesaid, with all things touching the same, and " this writ; so that we may have them from the day of the " *Holy Trinity* in three weeks, wheresoever we shall then " be in *England*, that inspecting the record and proceed- " ings aforesaid, we may cause to be done farther there- " upon, for amending that error, that which of right and " according to the law and custom of our kingdom of " *England* shall be meet to be done. Witness ourself at " *Westminster* the eighth day of *June* in the third year of " our reign. *Santhey.*

Writ of error
3 Mod. 153
Salk. 65. S. C.

"The answer of Sir *Edward Herbert*, Knt. Chief Justice "within named. The record and proceedings of the "plaint within mentioned, with all things touching the "same, before the lord the king, wheresoever, *&c.* at the "day within contained, I send in a certain record to this "writ annexed, as I am within commanded.

Edw. Herbert.

"Pleas at *Westminster*, before Sir *Edward Herbert*, Knt. "and his fellow justices of the lord the king of the Com-"mon Bench, of the term of *Easter* in the third year of the "reign of our lord *James* the Second, by the Grace of GOD, "of *England*, *Scotland*, *France*, and *Ireland* King, Defender "of the Faith, *&c.* *Roll* 616.

Declaration upon a warrant of attorney to the testator by an executrix and her husband.

"*Middlesex*, to wit, *Bridget* countess dowager of *Plymouth*, "executrix of the last will and testament of *Charles* earl "of *Plymouth*, was summoned to answer *Thomas Throck-*"*morton*, Esq. and *Dorothy* his wife, executrix of the last "will and testament of Sir *Edward Pick*, Knt. of a plea that "she render to them seventy-five pounds, which from them "she unjustly detains, *&c.* And whereupon the same *Tho-*"*mas* and *Dorothy*, by *Charles Draper* their attorney, say, "that whereas the said earl in his life-time, to wit, on the "third day of *May* in the thirty-second year of the reign "of our Lord *Charles* the Second, late king of *England*, "*&c.* at *Islington*, by his certain deed, which the same "*Thomas* and *Dorothy* produce here in court, dated the "same day and year, did give an authority to the same "Sir *Edward* to require and receive all and all manner "of sum and sums of money which then were, or at any "time or times to come within three years then next "following should become due and payable to the same "earl upon any account whatsoever, and to pay and dis-"pose thereof as he the said earl from time to time should "order and appoint the same *Edward* by any writing or "writings under his hand during the said three years, "and for the care and labour of the said Sir *Edward* in "the premises aforesaid, the said earl bound himself by "the same writing to pay to the said Sir *Edward* one "hundred pounds by the year of lawful money of *Eng-*"*land* during the aforesaid three years, or otherwise that "it should be lawful for the said Sir *Edward Pick* to "retain and pay to himself the said one hundred pounds "by the year during the aforesaid three years, out of such "monies as he should receive by virtue of the said deed, "as by the same deed more fully appears; and the said "*Thomas* and *Dorothy* in fact say, that he the said *Edward*

Salary of 100l. per ann. allowed to the attorney to be deducted out of what he

"afterwards, and for the space of three quarters of a year
"from thence next following, at *Islington* aforesaid, from
"time to time did solicit and require divers persons then — The attorney demands several sums of money, but none paid.
"debtors to the said earl to pay many sums of money then
"from them due and payable to the said earl: But during
"the said three quarters of a year, or at any time after-
"wards, the said Sir *Edward* did not receive any sums of
"money by virtue of the same deed, wherewith he could [786]
"pay himself the said one hundred pounds, or any part
"thereof; whereby an action accrued to the same Sir *Ed-* — Whereby the action accrued.
"*ward* in his lifetime, to require and have of the said earl
"the said seventy-five pounds: Nevertheless the said earl — Breach.
"in his lifetime, and the said countess after his the said
"earl's death, although often requested, or either of them,
"have or hath not yet paid the seventy-five pounds to the
"said Sir *Edward* in his lifetime, or to the said *Dorothy*
"after the death of the said Sir *Edward* while she was sole,
"or to the said *Thomas* and *Dorothy* after the marriage
"between them celebrated, or to any of them, but refused
"to pay the same to the said Sir *Edward* in his lifetime,
"and to the same *Thomas* and *Dorothy* after the marriage
"between them celebrated; and she the same countess
"doth still refuse to render the same to the said *Thomas*
"and *Dorothy*, and unjustly detains the same in delay of
"the faithful execution of the will of the said Sir *Edward*,
"and to the damage of them the said *Thomas* and *Dorothy*
"of ten pounds: And thereupon they bring suit, &c. And — Profert of the letters testamentary produced.
"the same *Thomas* and *Dorothy* produce here in court the
"letters testamentary of the aforesaid *Edward*, by which
"it sufficiently appears to the Court here, that she the
"said *Dorothy* is executrix of the will of the said *Edward*,
"and thereof hath administration, &c.

"And the said *Bridget*, by *William Rymer* her attorney,
"comes and defends the force and injury, when, &c.
"and says nothing in bar or preclusion of the action of
"the said *Thomas* and *Dorothy* aforesaid, whereby the
"same *Thomas* and *Dorothy* thereupon remain against
"the aforesaid *Bridget* undefended: Therefore it is con- — Judgment by nil dicit.
"sidered, That the said *Thomas* and *Dorothy* recover
"against the said *Bridget* their said debt, and their dama-
"ges by occasion of the detention of that debt, to fifty shil-
"lings, to the same *Thomas* and *Dorothy*, by their assent,
"by the Court here adjudged, to be levied of the goods
"and chattels which were the said earl's at the time of
"his death, being in the hands of the same *Bridget* to be
"administered, if she hath so much in her hands to ad-
"minister; and if she hath not, that then the damages

" aforesaid be levied of the proper goods and chattels of " the said *Bridget*; and the said *Bridget* countess of *Plymouth*, in mercy, &c.

Errors assigned.

" And the aforesaid *Bridget* countess dowager of *Plymouth*, by *Henry Doughty* her attorney, cometh and saith, " that in the record and proceedings aforesaid, and also in " giving of the judgment aforesaid, there is manifest error, " in this, to wit, That the declaration aforesaid, and the " matter in the same contained, are not sufficient in the " law to have and maintain the action aforesaid of the " said *Thomas* and *Dorothy* thereupon against her the said " countess: Therefore in that there is manifest error.

[787]

" There is error also in this, that by the record aforesaid " it appears, that the said judgment in manner and form " aforesaid given was given for the said *Thomas* and " *Dorothy* against her the said countess, in the plea afore- " said, whereas by the law of the land of this kingdom " of *England*, that judgment ought to have been given for " the same countess against the said *Thomas* and *Dorothy*; " and therefore in this there is likewise manifest error:

No warrant of attorney, and certiorari prayed.

" And the said countess further saith, that there is error in " this also, to wit, that there is not any warrant of attorney " filed of record in the said Court of Common Bench be- " tween the said parties of the plea aforesaid, to warrant " *Charles Draper* to be attorney for the said *Thomas* and " *Dorothy* against the said countess in the plea aforesaid; " wherefore the same countess prays a writ of the lord the " king of *certiorari* to be directed to the Chief Justice of the " said lord the king of the Common Bench, &c.

Entry of the certiorari.

And it is " granted to her, &c. by which it is commanded that Sir " *Edward Herbert*, Knt., Chief Justice of the Common Bench " aforesaid, examine the rolls and other remembrances of " the warrants of attorney of the county of *Middlesex*, of the " term of *Easter* in the third year of the reign of the said " lord the king, being in his custody of record, and with- " out delay to certify what in the same he shall find there- " upon to the said lord the king, wheresoever, &c. to- " gether with the writ of the said lord the king, to him " for that purpose directed, &c.

Return of the Chief Justice.

Which said Chief " Justice of the Bench aforesaid of our said lord the king " answered, that the execution of the writ aforesaid ap- " peared in a schedule to the writ annexed, in which " schedule are contained the title of the rolls of the war- " rants of attorney filed of the said term of *Easter* in the " aforesaid writ specified, being in the custody of him " the said Chief Justice of record; and the record of a " certain warrant of attorney between the parties afore-

" said of the plea aforesaid in the same form in which the " same warrant of attorney is entered of record in the " same rolls, which said title and warrants of attorney fol- " low in these words. Rolls of attornies received before " Sir *Edward Herbert*, Knt., Chief Justice of the lord the " king of the Common Bench, and his brethren, of the term " of *Easter* in the third year of the reign of our lord *James* " the Second, by the Grace of GOD, of *England*, *Scot-* " *land*, *France*, and *Ireland* King, Defender of the Faith, *&c.*

" *Middlesex*, to wit, *Thomas Throckmorton*, Esq. and *Do-* " *rothy* his wife, executrix of the last will and testament of " Sir *Edward Pick*, Knt. puts in his stead *Charles Draper* " his attorney, against *Bridget* countess dowager of *Ply-* " *mouth*, executrix of the last will and testament of *Charles* " earl of *Plymouth*, of a plea of debt, which said writ is fi- " led amongst the records without day, *&c.* And hereup- " on the aforesaid *Thomas* and *Dorothy*, by *Michael John-* " *son* their attorney, come *gratis* here in court, and the " aforesaid *Bridget* countess dowager of *Plymouth* as afore- " said, saith, that in the record and proceedings, and also " in the giving of judgment aforesaid, there is manifest " error, alleging the errors aforesaid by him in form " aforesaid alleged, and prays that the said judgment for " the errors aforesaid, and others being in the record and " proceedings aforesaid, may be reversed, annulled, and " entirely deemed as none; and that she be restored to all " which by occasion of the judgment aforesaid she hath " lost, *&c.* And that the said *Thomas* and *Dorothy* to the er- " rors aforesaid may rejoin, *&c.* And that the Court of the " said lord the king here may proceed to the examination " as well of the record and proceedings aforesaid as the " matters aforesaid above assigned for errors, *&c.* And " the said *Thomas* and *Dorothy* say, that there is not any " error either in the record and proceedings aforesaid, " or in the giving of the judgment aforesaid; and in like " manner pray that the Court of the said lord the king " may proceed to the examination as well of the record " and proceedings aforesaid, as of the matters aforesaid " above assigned for errors, and that the judgment afore- " said be in all things affirmed, *&c.* And because the " Court of the said lord the king now here are not yet advi- " sed of giving their judgment herein; day is therefore gi- " ven to the parties aforesaid before the said lord the king, " until three weeks from the day of St. *Michael* then next " following, wheresoever, *&c.* of hearing their judgment " thereon, forasmuch as the Court of the lord the king " now here are not yet thereupon, *&c.* At which day

Warrant of attorney.

[788]

Defendants rejoin in error.

Continuance.

" before the king at *Westminster* come the parties afore-
" said by their said attornies: But because the Court of
" the said lord the king now here are not yet advised of gi-
" ving their judgment of and upon the said premises, day
" is therefore given to the parties aforesaid before the lord
" the king, until eight days from the day of St. *Hilary*,
" wheresoever, &c. of hearing their judgment thereon, for-
" asmuch as the Court of the said lord the king here there-
" on are not yet, &c. At which day before the lord the king
" at *Westminster* come the parties aforesaid by their said
" attornies: But because the Court of the said lord the
" king now here are not yet advised of giving their judg-
" ment of and upon the premises, day is therefore given
" to the parties aforesaid before the lord the king, until
" fifteen days from the day of *Easter*, wheresoever, &c. of
" hearing their judgment thereon, in regard that the Court
" of the said lord the king here therein are not yet, &c. At
" which day before the lord the king at *Westminster* come
" the said parties by their attornies aforesaid: Upon which
" as well the record and proceedings aforesaid, and the
" judgment given thereon, as the said causes and matters
" above assigned for errors, being seen and more fully un-
" derstood and diligently examined by the Court of our
" said lord the king here; forasmuch as it seems to the
" Court of our said lord the king now here, that in the re-
" cord and proceedings aforesaid, and also in the giving of
" the judgment aforesaid, there is manifest error, it is con-
" sidered that the said judgment for the errors aforesaid,
" and others in the record and proceedings aforesaid, be
" revoked, annulled, and altogether deemed as none; and
" that the aforesaid *Bridget* countess dowager of *Plymouth*
" be restored to all things which by occasion of the judg-
" ment aforesaid she hath lost," &c.

Judgment reversed.

Pleas before the Lord the King at Westminster, *of the Term of* Easter *in the Eighth Year of the Reign of our Lord* William *the Third, now King of* England, *&c. Roll* 291.

FREEMAN AND OTHERS *against* BERNARD AND OTHERS.

[3 Ld. Raym. Entries 368. S. C.]

London, to wit, "BE it remembered, That heretofore, to wit, "in the term of St. *Hilary* in the sixth year of "the reign of the lord *William* the Third, now King of *England, &c.*, before the same lord the king at *Westminster* "came *Thomas Freeman* and *Thomas Haggar* by *Benjamin* "*Mould* their attorney, and brought into the court of our "said lord the king then there their certain bill against "*Samuel Bernard* and *Thomas Rodbard* in custody of the "marshal, &c. of a plea of trespass upon the case, &c.; and "there are pledges of prosecuting, namely, *John Doe* and "*Richard Roe;* which said bill followeth in these words; "that is to say, *London,* to wit, *Thomas Freeman* and *Thomas Haggar* complain of *Samuel Bernard* and *Thomas* "*Rodbard* in the custody of the marshal of the *Marshalsea* "of the lord the king, before the king himself being, for "that, to wit, that whereas on the eighth day of *August* in "the year of our Lord one thousand six hundred and ninety-three, at *London* aforesaid, to wit, in the parish of St. "*Mary le Bow* in the ward of *Cheap*, it was agreed between "them the said *Thomas Freeman* and *Thomas Haggar* and "the said *Samuel Bernard* and *Thomas Rodbard* in manner "and form allowing; that is to say, that the said *Samuel* "*Bernard* and *Thomas Rodbard* should deliver to the said "*Thomas Freeman* and *Thomas Haggar* sixteen bags of good "new hops of the then next growth, good brewers ware, "thirty and four shillings by the hundred weight, and that "they should be delivered at or before the twenty-fifth day "of *December* then next following, and thereupon in consideration that the said *Thomas Freeman* and *Thomas* "*Haggar* had paid to the said *Samuel Bernard* and *Thomas* "*Rodbard* one piece of gold coin, called a guinea, of lawful money of *England*, in part of payment thereof, and "then and there, at the special instance and request of "them the same *Samuel Bernard* and *Thomas Rodbard*, "had took upon themselves and had faithfully promised "the said *Samuel* and *Thomas Rodbard* to perform the "agreement aforesaid in all things on the part of them the

Comb. 440. Carth. 378. Salk. 69. Cases B. R. 130. 3 Salk. 45. Holt 79. S. C.

Declaration upon an agreement to deliver sixteen bags of hops before December 25.

Mutual promises to perform the agreement.

"said *Thomas Freeman* and *Thomas Haggar* to be perfor-
"med or fulfilled, according to the form and effect of the
"aforesaid agreement, they the said *Samuel Bernard* and
"*Thomas Rodbard* took upon themselves, and then and
"there faithfully promised the said *Thomas Freeman* and
"*Thomas Haggar*, that they the same *Samuel* and *Thomas*
"*Rodbard* would well and truly perform and fulfil the
"agreement aforesaid in all things on the part of them the
"said *Samuel* and *Thomas Rodbard* to be performed or ful-
"filled: Nevertheless the said *Samuel* and *Thomas Rodbard*
"their promise and undertaking aforesaid not at all regar-
"ding, but contriving and fraudulently intending the same
"*Thomas Freeman* and *Thomas Haggar* in this part craftily
"and subtilly to deceive and defraud, have not delivered
"to the said *Thomas Freeman* and *Thomas Haggar*, or ei-
"ther of them, the said sixteen bags of hops, or any par-
"cel thereof, upon or before the twenty-fifth day of *Decem-*
"*ber* next following after the making the said agreement,
"or at any time afterwards, but have hitherto altogether
"refused and still do refuse to deliver the same to them.

Breach in not delivering the hops.

"And whereas also afterwards, to wit, on the said eighth
"day of *August* in the year of our Lord aforesaid, at *London*
"aforesaid, in the parish and ward aforesaid, a certain other
"agreement was had and made in writing between the
"said *Samuel* and *Thomas Rodbard* and them the said *Tho-*
"*mas Freeman* and *Thomas Haggar* in form following, that
"is to say, that the said *Samuel Bernard* and *Thomas Rod-*
"*bard* should deliver to them the same *Thomas Freeman* and
"*Thomas Haggar* sixteen other bags of good new hops of
"the then next growth, good brewers ware, at the rate of
"thirty-four shillings by the hundred; and that they should
"be delivered upon or before the twenty-fifth day of *De-*
"*cember* then next following, which said written agreement
"was left in the hands of one *Thomas Ruck:* And whereas
"afterwards, to wit, on the same eihgth day of *August* in
"the year abovesaid, at *London* aforesaid, in the parish
"and ward aforesaid, a certain discourse was had and
"moved between the said *Samuel* and *Thomas Rodbard* and
"the said *Thomas Freeman* and *Thomas Haggar*, of and
"concerning the said agreement last mentioned, and of
"and concerning the delivery of two loads of hops to the
"same *Thomas Freeman* and *Thomas Haggar*, by the said
"*Samuel* and *Thomas Rodbard* to be made, and upon that
"discourse between the said *Samuel* and *Thomas Rodbard*
"and the same *Thomas Freeman* and *Thomas Haggar*, two
"other loads of hops, according to the said agreement, so
"as aforesaid left in the hands of the said *Thomas Ruck*, and
"that they the same *Thomas Freeman* and *Thomas Haggar*

Second count upon another agreement in writing set forth to deliver other sixteen bags of hops, and left in the hands of a third person.

Colloquium touching the agreement.

"should accept the said hops last mentioned, according to "the said first agreement last recited; and thereupon, in "consideration that they the same *Thomas Freeman* and "*Thomas Haggar* then and there, at the special instance "and request of the said *Samuel* and *Thomas Rodbard* had "paid to the said *Samuel* and *Thomas Rodbard* one other "piece of gold coin, called a guinea, of lawful money of "*England*, in part of payment of the same hops last men-"tioned, and had took upon themselves, and faithfully "promised the same *Samuel* and *Thomas Rodbard* to per-"form and fulfil the agreement aforesaid in all things on "the part of them the said *Thomas Freeman* and *Thomas* "*Haggar* to be performed and fulfilled, according to the "form and effect of the agreement aforesaid last men-"tioned, they the same *Samuel* and *Thomas Rodbard* took "upon themselves and then and there faithfully promised "the same *Thomas Freeman* and *Thomas Haggar*, that they "the same *Samuel* and *Thomas Rodbard* would well and "faithfully perform and fulfil the said agreement last men-"tioned in all things on the part of them the said *Samuel* "and *Thomas Rodbard* to be performed and fulfilled: Nev-"ertheless the aforesaid *Samuel* and *Thomas Rodbard* their "said promises and undertakings last mentioned in form "aforesaid made not regarding, but contriving and fraudu-"lently intending the same *Thomas Freeman* and *Thomas* "*Haggar* in this behalf craftily and cunningly to deceive "and defraud, have not, nor hath either of them delivered "the said two loads of hops last mentioned, or any parcel "thereof, to the same *Thomas Freeman* and *Thomas Haggar*, "upon or before the said twenty-fifth day of *December* "next following after the making the said promise and "undertaking last mentioned, or at any time afterwards, "but have hitherto altogether refused, and yet do refuse, "to deliver the same to them; wherefore the said *Thomas* "*Freeman* and *Thomas Haggar* say, that they are injured "and have damage to the value of two hundred pounds: "And thereupon they bring suit, &c.

Mutual promises.

[791]

Breach

"And now at this day, to wit, *Wednesday* next after fif-"teen days from the day of *Easter*, until which day the "said *Samuel* and *Thomas Rodbard* had leave to imparle to "the said bill, and then to answer, &c. before the lord "the king at *Westminster*, come as well the said *Thomas* "*Freeman* and *Thomas Haggar* by their said attorney, as "the said *Samuel* and *Thomas Rodbard* by *John Bernard* "their attorney: And the same *Samuel* and *Thomas Rod-*"*bard* defend the force and injury when, &c., and say "that the said *Thomas Freeman* and *Thomas Haggar* ought "not to have or maintain their action aforesaid thereupon

A submission to arbitration pleaded.

" against them; because they say, that after the making " the several promises and undertakings above in the said " declaration specified, that is to say, on the second day " of *November* in the year of our Lord one thousand six " hundred and ninety-four, at *London* aforesaid, to wit, at " the parish of St. *Mary le Bow* in the ward of *Cheap* afore- " said, as well the said *Thomas Freeman* and *Thomas Hag-* " *gar* as the said *Samuel* and *Thomas Rodbard* did submit " and put themselves to the award, ordination, and judg- " ment of Sir *John Parsons*, Knight, and *Richard Hammond*, " brewers arbitrators, as well on the part of the said *Tho-* " *mas Freeman* and *Thomas Haggar*, as on the part of them " the said *Samuel* and *Thomas Rodbard*, indifferently nomi- " nated and elected to award, ordain, adjudge, and deter- " mine of, and upon, and concerning all and all manner of

[792]

" action and actions, cause and causes of actions, suits, debts, " bonds, bills, specialties, executions, accounts, sum and " sums of money, differences, controversies, trespasses, da- " mages, claims, and demands whatsoever at any time before " then had, moved, commenced, prosecuted, done, promised, " committed, or depending in suit, controversy, question, " or demand, by or between the said *Thomas Freeman* and " *Thomas Haggar* and the said *Samuel* and *Thomas Rodbard*, " for or by reason of any matter, cause, or thing whatsoever;

To be made in writing before the first of December.

" so that the said arbitrators should make and give their " award and determination of and concerning the premises " in writing indented under their hands and seals, ready " to be delivered to the said *Thomas Freeman* and *Thomas* " *Haggar*, *Samuel* and *Thomas Rodbard*, or either or any of " them, at or in the mansion-house of *Toby Winne* scrivener,

Arbitrators make their award.

" in a street called *Bartholomew Lane*, near the *Royal Ex-* " *change*, *London*, to wit, in the parish of St. *Bartholomew* " *Exchange*, in the ward of *Broadstreet*, *London*, the said Sir " *John Parsons* and *Richard Hammond* the arbitrators afore- " said, having taken upon themselves the trouble of the " said award, by a certain writing indented under the " hands and seals of the said arbitrators, and ready to be " delivered to the said *Thomas Freeman* and *Thomas Hag-* " *gar*, *Samuel* and *Thomas Rodbard*, either or any of them, " did arbitrate, make, and give their award and determi- " nation of and concerning the premises, that the said " *Samuel* and *Thomas Rodbard*, and also the said *Thomas* " *Freeman* and *Thomas Haggar*, or the several respective " executors and administrators of the said *Samuel* and " *Thomas Rodbard*, *Thomas Freeman*, and *Thomas Haggar*, " should mutually sign and seal, and as their act and deed " deliver to and for the use of each other, their executors " and administrators respectively, full and sufficient gene-

"ral releases and discharges of all actions, suits, accounts, "debts, and demands whatsoever, in law or equity, of or "concerning the premises, to the said arbitrators as afore-"said in manner submitted. And the said *Samuel* and "*Thomas Rodbard* say, that they, from the time of making "the said award, always were and now are ready to sign "and seal, and as their acts and deeds deliver to the same "*Thomas Freeman* and *Thomas Haggar* such releases and "discharges, as by the said arbitrators are above awarded, "if the said *Thomas Freeman* and *Thomas Haggar* should "and would be willing to accept those releases and dis-"charges from the said *Samuel* and *Thomas Rodbard:* And "this they are ready to verify: Wherefore the same *Samuel* "and *Thomas Rodbard* pray judgment, if the said *Thomas* "*Freeman* and *Thomas Haggar* ought to have or maintain "their action aforesaid thereupon against them, &c.

"To this the plaintiffs demurred, and the defendants "joined in demurrer."

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[793]

Pleas before our Lord the King and our Lady the Queen at Westminster, *of the Term of the* Holy Trinity *in the Seventh Year of the Reign of* William *the Third, now King of* England, *&c.* *Roll* 176.

BACON *against* DEBARY.

[3 Ld. Raym. Entries 361. S. C.]

Salk. 70. Skin 679. Comb. 439. Carth. 412. Cases B. R. 129. Holt 78. S. C

London, to wit, "BE it remembered, That heretofore, that "is to say, in the term of *Easter* last past, be-"fore the lord the king at *Westminster* came *Josiah Bacon* "by *William Baker* his attorney, and brought into the "court of the said lord the king then there his certain bill "against *David Debary*, otherwise called *David Debary* of "*London*, merchant, in custody of the marshal, &c., of a "plea of debt; and there are pledges of prosecuting, "namely *John Doe* and *Richard Roe;* which said bill fol-"loweth in these words, that is to say, *London*, to wit, "*Josiah Bacon* complains of *David Debary*, otherwise "called *David Debary* of *London*, merchant, in the custody "of the marshal of the *Marshalsea* of our lord the king, "before the king himself being, of a plea that he render

Declaration upon a bond of arbitration.

"to him six hundred pounds of lawful money of *England*, "which he owes to him and unjustly detains, for that, to "wit, That whereas the said *David*, on the eighth day of "*November* in the year of our Lord one thousand six hun-"dred and ninety-four, at *London*, to wit, in the parish of "St. *Mary le Bow* in the ward of *Cheap*, by his certain "writing obligatory, sealed with the seal of the same *Da-*"*vid*, which to the Court of the said lord the king is now "here shewn, the date of which is the same day and year, "acknowledged himself to be held and firmly bound to "the said *Josiah* in the aforesaid six hundred pounds, to "be paid to the same *Josiah* when he should be thereunto "requested: Nevertheless the said *David*, although often "requested, *&c.*, hath not yet paid the said six hundred "pounds to the said *Josiah*, but hath hitherto altogether "refused and still doth refuse to pay the same to him, to "the damage of the same *Josiah* of one hundred pounds: "And therefore he brings suit, *&c.*

"And now at this day, to wit, *Friday* next after the mor-"row of the *Holy Trinity* in this same term, until which "day the said *David* had leave to imparle to the said bill, "and then to answer, *&c.* before the lord the king at *West-*"*minster*, comes as well the said *Josiah* by his said attor-
[794] "ney, as the said *David* by *John Green* his attorney, and the "same *David* defends the force and injury, when, *&c.*, and "prays *oyer* of the writing obligatory; and it is read to "him, *&c.*; he also prays *oyer* of the condition of the same "writing obligatory; and it is read to him in these words, "to wit, The condition of the obligation is such, that if "the above-bounden *David Debary*, for and on the behalf "of *Jacob Dernyter* of *Hamborough*, merchant, his executors "and administrators, do and shall well and duly to stand "to, obey, abide, observe, perform, fulfil, and keep the "award, arbitrement, order, final end, determination, and "judgment of *Maurice Williams*, *Nicholas Cutler*, and *Michael* "*Milford* of *London*, merchants, or any two of them, arbitra-"tors, as well on the part and behalf of the above-named "*Josiah Bacon*, and by their mutual assents and consents "indifferently elected, named, and chosen to arbitrate, "award, order, judge, determine, and a final end to make "of, for, upon, and concerning all manner of action and "actions, cause and causes of action, suits, debts, accounts, "reckonings, sum and sums of money, covenants, con-"tracts, promises, trespasses, damages, bonds, bills, spe-"cialties, judgments, extents, executions, trespasses, strifes, "differences, controversies, matters, claims, and demands "whatsoever, as now are, or at any time before the date "above written have been moved, stirred up, or depend-

" ing between the said *David Debary*, as attorney to the " said *Jacob Dernyter* of the one part, and the said *Josiah* " *Bacon* of the other part, for, touching, or concerning certain accounts between the said *Josiah Bacon* and the said " *Jacob Dernyter*, so as the said award, arbitrement, order, final end, determination, and judgment of the said arbitrators, or any two of them, of and upon the premises, be made " and set down in writing, indented under their hands and " seals, and be delivered, or ready to be delivered up unto " the said parties respectively in difference, requiring the " same at or in the now dwelling-house of *John Chambers*, " scrivener, situate in *Lombard-street*, *London*, on or before " the one and twentieth day of this instant *November*; then " this obligation to be void, or else to stand in full force and " virtue; which being read and heard, the same *David Debary* saith, that the said *Josiah Bacon* ought not to have " or maintain his said action against him thereupon; because he saith, that the said *Maurice Williams*, *Nicholas* " *Cutler*, and *Michael Milford* in the condition aforesaid " named, or two of them, did not make any award in writing indented under their hands and seals, of, for, or concerning the premises aforesaid in the condition aforesaid " above specified, upon or before the twenty-first day of " *November* in the condition aforesaid mentioned, according to the form and effect of the said condition: And " this he is ready to verify: Wherefore he prays judgment " if the said *Josiah Bacon* ought to have or maintain his " action aforesaid thereupon again him, *&c.*

No award pleaded.

" And the said *Josiah Bacon* saith, That he, notwithstanding any thing by the said *David Debary* above in " his plea alleged, ought not to be precluded from having " his action aforesaid thereupon against him the said " *David*, because he saith, that after the making the " writing obligatory aforesaid, to wit, upon the twenty-first day of *November* in the year of our lord one thousand six hundred and ninety-four, in the said condition specified, at *London* aforesaid, in the parish and " ward aforesaid, the said *Nicholas Cutler* and *Michael* " *Milford*, two of the arbitrators in the said condition " above specified, took upon themselves the trouble of " awarding and ordaining of and concerning the premises " in the said condition above-mentioned, and made their " award in writing indented under their hands and seals " between the parties, and of and concerning the premises in the said condition mentioned; by which said " award, produced here in court, the same arbitrators, " reciting, That whereas the said *David*, for and on the " behalf of *Jacob Dernyter* of *Hamborough*, merchant,

Replies an award.

Award set forth.

"and the said *Josiah*, by interchangeable obligations bear-
"ing date on the eighth day of *November* then instant, were
"bound the one to the other in six hundred pounds, con-
"ditioned to stand to the award of the said *Maurice Wil-*
"*liams*, *Nicholas Cutler*, and *Mich. Milford*, or any two of
"those arbitrators, mutually by them elected to adjudge.
"determine, and finally end all and all manner of action
"and actions, cause and causes of actions, suits, debts,
"accounts, reckonings, sum and sums of money, covenants,
"contracts, promises, trespasses, damages, obligations,
"bills, specialties, judgments, extents, executions, quar-
"rels, differences, controversies, matters, claims, and de-
"mands whatsoever, which then were, or at any time be-
"fore the date of the writing obligatory aforesaid had been
"moved, stirred up, or depending between the said *David*
"*Debary*, (as attorney of the said *Jacob Dernyter*.) and the
"said *Josiah Bacon* touching the accounts between the
"said *Josiah Bacon* and the said *Jacob Dernyter*, so that
"the award and determination of the said arbitrators, or
"of any two of them, should be made in writing indented
"under their or any two of their hands and seals, ready
"to be delivered to the said parties in difference, requi-
"ring the same, at or in the then and now dwelling-house
"of *John Chambers*, scrivener, situate in *Lombard-street*,
"*London*, upon or before the said twenty-first day of
"*November*, as by the said obligations and the conditions
"of the same more fully appears; the said *Nicholas*
"*Cutler*, and *Michael* did award and order the said *David*
"*Debary*, his executors, administrators or assigns, on the
"part of the said *Jacob Dernyter*, to pay or cause to be
"paid to the said *Josiah*, his executors, administrators
"or assigns, the sum of three hundred and forty-five
"pounds six shillings and ten pence of lawful money of
"*England*, upon or before the second day of *January*
"then next; and they did further award and ordain, that
"the said *Josiah Bacon* and the said *David Debary*, on
"the behalf of the said *Jacob Dernyter*, upon the payment
"of the said sum of money as aforesaid, should sign and
[796] "seal, and lawfully execute and deliver to or for the use
"of each of them a good and sufficient release of all and
"all manner of action and actions, cause and causes of
"action, suits, debts, accounts, reckonings, sum and sums
"of money, covenants, contracts, promises, trespasses,
"damages, obligations, bills, specialties, judgments, ex-
"tents, executions, quarrels, differences, controversies,
"matters, claims, and demands whatsoever touching the
"said accounts, as by the said award appears. And the
"same *Josiah* in fact, saith, That the said award in form

" aforesaid made afterwards, to wit, on the same twenty-
" first day of *November* in the year aforesaid, at *London*
" aforesaid, in the parish and ward aforesaid, was deliver-
" ed as well to the said *Josiah* as to the said *David*, accor- Award delivered.
" ding to the form and effect of the condition of the wri-
" ting obligatory aforesaid: And the same *Josiah* further
" saith, that although he the said *Josiah*, from the time of
" making the award aforesaid, hitherto hath well and truly
" observed, performed, and kept all and singular the mat-
" ters and things in the said award contained on the part
" of him the said *Josiah* to be performed and fulfilled ac-
" cording to the form and effect of the same award; pro-
" testing also that the said *David Debary* from the time of Protestation
" making the said award hitherto hath not observed, per-
" formed, or fulfilled the award aforesaid in any things
" to be performed and fulfilled according to the form and
" effect of the said award; the same *Josiah* in fact saith,
" that the said *David Debary* did not pay or cause to be Breach assigned
" paid to the said *Josiah* the said sum of three hundred forty
" and five pounds six shillings and ten pence, upon or be-
" fore the said second day of *January*, which he then ought
" to have paid to him, according to the form and effect of
" the said award: And this he is ready to verify: Where-
" fore he prays judgment and his said debt, together with
" his damages by occasion of the detention of that debt, to
" him to be adjudged, *&c.*
" Demurrer and joinder, and judgment for the defen-
" dant."

Pleas before our Lady the Queen at Westminster, *of the Term of* St. Hilary *in the Second Year of the Reign of the Lady* Anne, *now Queen of* England, *&c. Roll* 450. [797]

WINTER *against* GARLICK.

City of *Bristol*, to wit, " BE it remembered, That heretofore, Salk. 75
" to wit, in the term of *Easter* last past,
" before our lady the queen at *Westminster* came *Ed-*
" *mund Winter* by *Richard Longford* his attorney. and
" brought into the court of the said lady the queen then
" there his certain bill against *Edward Garlick*, otherwise
" called *Edward Garlick* of the city of *Bristol*, apothecary,

"in the custody of the marshal, &c. of a plea of debt; "and there are pledges of prosecuting, namely, *John Doe* "and *Richard Roe;* which said bill followeth in these "words, that is to say, city of *Bristol*, to wit, *Edmund Winter* complains of *Edward Garlick*, otherwise called *Edward Garlick* of the city of *Bristol*, apothecary, in the custody of the marshal of the *Marshalsea* of the lady the "queen, before the queen herself being, of a plea, That "he render to him one hundred pounds of lawful money of "*England*, which he oweth to him, and unjustly detains, "for that, to wit, that whereas the said *Edward*, on the "nineteenth day of *August* in the thirteenth year of the "reign of our lord *William* the Third, late king of *England*, &c. at the city of *Bristol* in the county of the same "city, by his writing obligatory, sealed with the seal of "him the said *Edward*, and shewn to the Court of the lady "the queen now here, the date of which is on the same "day and year, acknowledged himself to be held and firmly "bound to the said *Edmund* in the aforesaid one hundred "pounds, to be paid to the same *Edmund* when he should "be thereunto afterwards required: Nevertheless the said "*Edward*, although often requested, &c. hath not yet paid "the said one hundred pounds to the same *Edmund*, but "hath hitherto altogether refused and still doth refuse to "pay the same to him, to the damage of him the said *Edmund* of ten pounds: And therefore he brings suit, &c.

Declaration upon arbitration bond.

Plea.

"And now at this day, to wit, *Monday* next after eight "days from the day of St. *Hilary* in this same term, until "which day the said *Edward* had leave to imparl to the "said bill, and then to answer, &c. before the lady the "queen at *Westminster* comes as well the said *Edmund* "by his said attorney, as the said *Edward* by *John Tilladam* his attorney; and the said *Edward* defends the "force and injury when, &c. and prays oyer of the "writing obligatory aforesaid; and it is read to him, &c. "and he prays also oyer of the condition of the same "writing; and it is read to him in these words, to wit, "The condition of this obligation is such, that if the "above-bounden *Edward Garlick*, his heirs, executors, "and administrators, for his and their parts and behalf, "do and shall in all things well and truly stand to, obey, "abide, perform, fulfil, and keep the award, order, arbitrement, final end and determination of *John Hinde* of "the city of *Bristol* aforesaid, Gentleman, and *John* "*Packer* of the same city, bell-founder, arbitrators, indifferently named, elected, and chosen as well on the "part and behalf of the above-bounden *Edward Garlick*, "as of the above-named *Edmund Winter*, to arbitrate,

[798]

" award, order, judge, and determine of and concerning all " and all manner of action and actions, cause and causes " of action, suits, bills, bonds, specialties, judgments, exe- " cutions, extents, quarrels, controversies, trespasses, da- " mages, and demands whatsoever, at any time or times " heretofore had, made, moved, brought, consented, prose- " cuted, done, suffered, committed, or depending by and " between the said parties, or either of them, so as the " said award be made in writing, and ready to be delivered " to either of the said parties requiring the same, on or " before the eighth hour in the afternoon of this present " day; but if the said arbitrators do not make such their " award of and concerning the premises, by the time " aforesaid, that then if the said *Edward Garlick*, his exe- " cutors and administrators, for his and their parts and " behalfs, do in all things well and truly stand to, obey, " abide, perform, fulfil, and keep the award, order, arbitre- " ment, umpirage, final end, and determination of *Robert* " *Godfrey*, Gentleman, of and concerning the premises, " so as the said umpire do make his award or umpirage " of and concerning the premises in writing, and ready to " be delivered to either of the said parties requiring the " same, on or before the eighth hour in the afternoon of " the day next ensuing the date of these presents, then " this obligation to be void, or else to remain in full force, " strength, and virtue; which being read and heard, " the same *Edward* saith that the same *Edmund* ought " not to have or maintain his action aforesaid thereupon " against him: Because he saith that the aforesaid *John* " *Hinde* and *John Packer*, the arbitrators in the condition " aforesaid named, made no award, order, arbitration, " conclusion, final end, or determination of and in the " premises in the said condition above mentioned, at or be- " fore the eighth hour in the afternoon of the said nine- " teenth day of *August* in the thirteenth year abovesaid, " being the day of the date of the writing obligatory afore- " said: But the same *Edward* further saith, that the afore- " said *Robert Godfrey* the umpire in the same condition " likewise named, having taken upon himself the burden " of arbitrating of and concerning the premises in the said [799] " condition above specified, afterwards and before the " eighth hour in the afternoon of the day next following " the date of the writing obligatory aforesaid, in the " same condition specified, to wit, at the eighth hour in " the forenoon of the same day, at the city of *Bristol* " aforesaid in the county of the same city, made his um- " pirage in writing of and concerning the premises afore- " said, then and there ready to be delivered to the par-

Pleads no award made by the arbitrators, but that the umpire did.

The umpirage set forth that the

defendant should pay cost of suit.

"ties aforesaid in manner and form following; that is to "say, that all suits at law then depending between the "aforesaid parties should cease, and be no further prose-"cuted: and that the said *Edward Garlick* should pay to "the said *Edmund Winter*, at the then dwelling-house of "*Samuel Fitsall*, situate in *Castle-street* in *Bristol* aforesaid, "the sum of ten shillings, and the costs of law which the "said *Edmund Winter* had been at in that suit; and that "after the payment of the said sum of ten shillings in "manner aforesaid, they the said *Edmund Winter* and "*Edward Garlick* should give to each other general re-"leases of all actions, suits, controversies, and demands from "the beginning of the world to the nineteeth day of the "then instant *August*, in common form; and the same *Ed-"ward* further saith, that after making the umpirage "aforesaid, and before the day of exhibiting the said bill "of the said *Edmund*, to wit, on the twenty-first day of "*August*, in the thirteenth year aforesaid, at the said "dwelling-house of the said *Samuel Fitsall*, situate in *Castle "street* in *Bristol* aforesaid, he the same *Edward* was ready, "and offered to pay to the same *Edmund* then and there "being present the said ten shillings, and to seal, and as "his deed to deliver to the same *Edmund* a written gene-"ral release of all actions, suits, controversies, and de-"mands, from the beginning of the world unto the said "nineteenth day of *August*, in the umpirage aforesaid "mentioned, in common form; but the said *Edmund* then "and there altogether refused to receive or accept the "said ten shillings and the said written release from the "said *Edward*: And this he is ready to verify: Wherefore "he prays judgment if the said *Edmund* ought to have or "maintain his said action thereupon against him, &c.

Tender and refusal.

Replies and sets forth the cause of action, and levying a plaint.

"And the said *Edmund* saith, that he, notwithstanding "any matters by the aforesaid *Edward* above in his plea "alleged, ought not to be precluded from having his said "action thereupon against him, because he saith that the "said *Edward*, before the said time of making the writing "obligatory aforesaid, at the city of *Bristol* aforesaid, in "the county of the same city, and within the jurisdiction "of the Court of our said late lord the king, held at his "said city of *Bristol* before the mayor and aldermen "of the same city, falsely and maliciously had said and "published, concerning the same *Edmund*, divers false, "feigned, scandalous, and malicious words; and the same "*Edmund*, for the obtaining and recovering damages by "occasion of the speaking and publishing of those words, "before the said time of making the writing obligatory "aforesaid, levied in the said court of the said late lord

[800]

"the king, held at the city of *Bristol* aforesaid before the "mayor and aldermen of the city aforesaid, a certain plaint "against the said *Edward* of a plea of trespass upon the "case, and thereupon such proceedings were had, that "he the same *Edmund*, at the city of *Bristol* aforesaid, in "the county of the same city, paid, expended, and laid "out, in the prosecution of the aforesaid plaint against "the said *Edmund*, the sum of four pounds five shillings "and ten pence of lawful money of *England*, and there-"upon the same *Edmund* and *Edward* for the determina-"tion of that suit, and all other demands whatsoever, af-"terwards, to wit, on the said nineteenth day of *August* in "the thirteenth year of the reign of the said late lord the "king abovesaid at the city of *Bristol*, in the county of the "same city, by their several writings obligatory, by each "to the other of them mutually sealed and delivered, sub-"mitted themselves to perform and fulfil the award "of the aforesaid *John Hinde* and *John Packer*, or for want "thereof the umpirage of the aforesaid *Robert Godfrey*, "that is to say, the said *Edward* by his writing obligatory "in the said declaration above mentioned; and the same "*Edmund* in fact saith, that he the said *Edmund*, after the "making of the umpirage aforesaid by the said *Robert*, and "before the day of exhibiting the said bill of the aforesaid "*Edmund*, to wit, on the said twenty-first day of *August* in "the thirteenth year of the reign of the said late king "abovesaid, at the city of *Bristol* aforesaid in the county "of the same city, did give notice to the said *Edward*, that "he the aforesaid *Edmund* in prosecution of the said "suit had paid and expended the aforesaid sum of four "pounds five shillings and ten pence, and then and there "demanded that money of the said *Edward*; and that the "said *Edward* at any time hitherto hath not paid the said "four pounds five shillings and ten pence to the same *Ed-mund*, according to the form and effect of the umpirage "aforesaid: And this he is ready to verify: Wherefore he "prays judgment, and his debt aforesaid, together with "his damages by occasion of the detention of that debt, "to him to be adjudged, *&c.*

Averment of his expense in the suit.

And their submission to the award by the said bond.

Notice of his expense and request, and defendant's refusing to pay.

"Demurrer and joinder."

THE

TABLE

TO THE

FIRST AND SECOND VOLUMES.

Account.

Actions in General.

Action on the Case.

Action of the Case* on *Assumpsits.

Ancient Demesne.

Arbitraments.

Bail in Criminal Cases.

Discent.

Infants.

Marshal and Marshalsea.

Master and Servant.

Powers, &c.

R.

THE

TABLE TO THE PLEADINGS.

A.

Abatement.

Action on the Case on Assumpsit.

For Misfeazance.

THE TABLE TO THE PLEADINGS.

M.

O.

P.

Q.

R.

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